(16,805.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 246.

LUCY T. DAVIS, MILLARD P. McCORMICK, AND VIRGINIA-ALABAMA COMPANY, PLAINTIFFS IN ERROR,

vs.

LOUIS COBLENS AND MARTIN LAUER.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

LUCY T. DAVIS ET AL., Appellants,
vs.
LOUIS COBLENS and MARTIN LAUER. } No. 694.

Supreme Court of the District of Columbia.

LUCY T. DAVIS ET AL.
vs.
LOUIS COBLENS ET AL. } At Law. No. 38058.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed May 17, 1895.

In the Supreme Court of the District of Columbia, the 17th Day of May, 1895.

CHARLES M. N. LATIMER, LUCY T. DAVIS, William W. Boarman, Millard P. McCormick, and Virginia-Alabama Company, a Corporation, Plaintiffs,
vs.
LOUIS COBLENS and MARTIN LAUER, Trustees, Defendants. } Law. No. 38058.

The plaintiffs, Charles M. N. Latimer, Lucy T. Davis (who sues in respect of her sole and separate estate), William W. Boarman, Millard P. McCormick, and The Virginia-Alabama Company, a corporation organized under the laws of the State of Virginia, sue the defendants to recover the ninety-nine one-hundredths ($\frac{99}{100}$) undivided part of all of original lot numbered ten (10), in square numbered ten hundred and thirty-one (1,031), situate in the city of Washington, District of Columbia, in which plaintiffs claim an estate in fee-simple, and of which the plaintiffs were lawfully possessed on, to wit, the first day of March, 1895, when the defendants entered the same and unlawfully ejected the plaintiffs therefrom and unjustly detain the same from the plaintiffs.

2 And the plaintiffs claim the possession of said undivided part of said lot, with the improvements thereon and the appurtenances thereof, and the costs of this suit.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occuring after the day of the service hereof; otherwise judgment.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Plaintiffs.

Plea.

Filed October 8, 1895.

In the Supreme Court of the District of Columbia.

C. M. N. LATIMER ET AL.
vs.
LOUIS COBLENS ET AL. } No. 38058. At Law.

Plea.

The defendants, for plea to the plaintiffs' declaration, say they are not guilty as alleged.

J. J. DARLINGTON,
Attorney for Defendants.

I consent that the judgment in this case may be vacated and this plea filed.
Oct. 8, 1895.

FRANKLIN H. MACKEY,
Att'y for Pl'ffs.

Joinder of Issue.

Filed October 19, 1895.

In the Supreme Court of the District of Columbia, the 19th Day of October, 1895.

CHARLES M. N. LATIMER ET AL.
vs.
LOUIS COBLENS ET AL. } At Law. No. 38058.

The plaintiffs join issue with the defendants on plea filed herein.

W. MOSBY WILLIAMS AND
FRANKLIN H. MACKEY,
Attorneys for Plaintiffs.

Memorandum.

Jan'y 29, 1897.—Leave granted to amend declaration by striking out plaintiffs Charles M. N. Latimer and William W. Boarman; verdict for defendants.

FRIDAY, *February* 26, 1897.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

CHARLES M. N. LATIMER, LUCY T. DAVIS, William W. Boarman, Millard P. McCormick, and Virginia-Alabama Company, a Corporation, Plaintiffs,
v.
LOUIS COBLENZ and MARTIN LAUER, Trustees, Def'ts.
} At Law. No. 38058.

This case coming on to be heard upon the plaintiffs' motion for a new trial and the same having been heard, it is considered that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiffs take nothing by their suit, and that the defendants go thereof without day and recover against the plaintiffs Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company their costs of suit, to be taxed by the clerk, and have execution thereof.

Notice of Appeal.

Filed March 2, 1897.

In the Supreme Court of the District of Columbia.

CHARLES M. N. LATIMER ET AL.
vs.
LOUIS COBLENS, Trustee, ET AL.
} Law. No. 38058.

The clerk of said court will enter an appeal from the judgment rendered in the above-entitled case against the plaintiffs Millard P. McCormick, Lucy T. Davis, and The Virginia-Alabama Company and issue a writ of citation.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for said Plaintiffs and Appellants.

4 In the Supreme Court of the District of Columbia.

LUCY T. DAVIS, MILLARD P. MCCORMICK, and Virginia-Alabama Company
vs.
LOUIS COBLENS and MARTIN LAUER, Trustees. } At Law. No. 38058.

The President of the United States to Louis Coblens and Martin Lauer, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 2d day of March, 1897, wherein Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 2d day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 2d day of March, 1897.

J. J. DARLINGTON,
Attorney for Appellee-.

Memorandum.

M'ch 9.—Appeal bond filed.

Memorandum.

Apr. 5, '97.—January term prolonged 30 days to settle bill of exceptions.

Supreme Court of the District of Columbia, May 5th, 1897.

CHARLES M. N. LATIMER ET AL., Pl'ffs,
v.
LOUIS COBLENZ, Trustee, ET AL., Def'ts. } At Law. No. 38058.

Now again come here the plaintiffs, by their attorneys, and tender to the court here their bill of exceptions taken during the trial of this case and pray that it may be duly signed, sealed, and made part of the record now for then, which is done accordingly.

5 *Bill of Exceptions.*

Filed May 5, 1897.

In the Supreme Court of the District of Columbia.

CHARLES M. N. LATIMER ET AL.
vs.
LOUIS COBLENS, Trustee, ET AL. } No. 38058. At Law. Doc. —.

Bill of exceptions.

Be it remembered that the above-entitled cause came on for trial on the 27th day of January, A. D. 1897, before Mr. Justice Cole and a jury, Messrs. Franklin H Mackey and W. Mosby Williams appearing on behalf of the plaintiffs and Messrs. W. H. Sholes and J. J. Darlington appearing on behalf of the defendants.

And thereupon, to maintain the issues on their part joined, the plaintiffs gave evidence tending to prove that on the division between the United States commissioners and the original proprietors lot 10, in square 1031, in the city of Washington, in the District of Columbia, was allotted in severalty and in fee to Abraham Young, who thereafter died intestate, seized thereof, and leaving a widow, now deceased, and as his only heirs-at-law his six children; that thereafter, by appropriate partition proceedings, partition of his lands between his said heirs was made, in which partition the said lot 10 was assigned to and the title thereof became duly vested in his son, Richard Young, who died July 30, 1860, leaving a last will and testament making certain specific bequests and devises, none of which included the said lot 10, and devising the residue of his estate to his widow, Matilda Young, for life, the remainder in fee to his children, Lucy A. M. Bevans, Tracenia Latimer, Sophronia Magruder, Elizabeth T. B. McCormick, and Brook W. Young; that the said Matilda Young, life tenant, died October 7, 1874; that the said Lucy A. M. Bevans was married to her husband, John T. Bevans, prior to the death of Richard Young and died in the year 1875, leaving her said husband, who is still living, and Mary O. Munday, James Bevans, William Brook Bevans, Frances Beavans, and Tracenia Bevans, and three grandchildren, namely, Roberta Baker Higgins, William Braddock, and John Braddock, her only heirs-at-law; that the said Tracenia Young, daughter of the said Richard, was married in his lifetime to Edwin Latimer and died November 15, 1879, leaving her said husband surviving her, who died April 20th, 1880; that she left two children, namely, Lucy T., who was married prior to the death of the said life tenant to Americus Davis, and Charles M. N. Latimer, as her only heirs-at-law; that Sophronia Young, daughter of the said Richard, married Richard Y. Magruder before the death of the said life tenant and died about the year 1880 or 1885, having survived her said husband and leaving her two children, namely, Ella, who married Samuel Cox in the lifetime of the said Sophronia, and Richard Y. Magruder, her only heirs-at-law; that Elizabeth

6 T. B. Young, daughter of the said Richard, was married in his lifetime to Alexander McCormick and died March 22, 1889, and that her husband died July 2, 1891, and that Brook W. Young, son of the said Richard Young, is still living.

Plaintiffs then offered in evidence a duly executed deed, dated December 30th, 1886, and duly recorded among the land records of the said District October 14th, 1887, from said Richard Y. Magruder and wife and said Ella M. Cox and husband to John H. Walter, conveying to him in fee all their right, title, and interest in any lands in the city of Washington, D. C., whereof said Richard Young had died seized; also a similar deed from said Charles M. N. Latimer *et ux.* and Lucy T. Davis *et vir*, dated February 28th, 1887, and recorded October 14th, 1887, in said land records and conveying in fee to said Walter all their right, title, and interest as in the deed just above recited, and also a deed of same date from Elizabeth T. B. McCormick and Alexander McCormick, her husband, duly recorded, conveying all their right, title, and interest in all real estate in the city of Washington to the plaintiff Millard P. McCormick in fee.

Also a similar deed from said Brook W. Young and wife, dated December 30th, 1886, and recorded among said land records October 14th, 1887, to said Millard P. McCormick, conveying to him in fee all their right, title, and interest to any lands in the city of Washington whereof said Richard Young died seized; also a deed, duly executed, from said Millard P. McCormick and wife to Bartow L. Walker, dated October 10th, 1887, and duly recorded, conveying to him in fee all of said McCormick's interest which was acquired by the deed next above recited; also a deed, duly executed, from said Bartow L. Walker and wife, dated October 13th, 1887, and duly recorded in said land records October 14th, 1887, conveying to said John H. Walter in fee an undivided one-half interest in and to the land acquired by the deed next above recited; also a deed, duly executed, from said John H. Walter, dated October 3rd, 1887, and duly recorded October 14th, 1887, in said land records, conveying in fee to said Bartow L. Walker an undivided one-half interest in the lands acquired by said Walter by the deeds above recited from Richard Y. Magruder and wife, Ella M. Cox *et vir*, Charles M. N. Latimer *et ux.*, and Lucy T. Davis *et vir*.

Plaintiffs then offered in evidence a duly executed deed, dated the 25th day of October, 1892, and duly recorded among said land records on November 17th, 1892, in Liber 1735, folio 478, from John H. Walter, unmarried, to Charles M. N. Latimer, Lucy T. Davis, Ella M. Cox, and Mary E. Magruder, conveying "the following-described land and premises, situate, lying and being in the District of Columbia and distinguished as all those lands and tenements which were conveyed by said Charles M. N. Latimer and wife and said Lucy T. Davis and husband to said John H. Walter, his heirs and assigns by deed dated the 28th day of February, A. D. 1887, and recorded October 14th, 1887, in Liber 1277 at folio 475 *et sequitur* of the land records of the District of Columbia; and also all

7 those lands and tenements which were conveyed by said Ella M. Cox and husband and by Richard Y. Magruder (now deceased) and his wife, the said Mary E. Magruder to said John H. Walker, his heirs and assigns, by deed dated December 30th, A. D. 1886 and recorded in Liber 1277 folio 472 *et sequitur* of said land records; also all those lands and tenements which were conveyed by Bartow L. Walker and wife to said John H. Walter, his heirs and assigns by deed dated October 13th, 1887 and recorded October 14th, 1887, in Liber 1277, folio 487, of said land records, save and excepting from this conveyance hereby made so much of Brook W. Young's former interest in the land embraced by said last-mentioned deed as came to his father Richard Young in any other way than by direct inheritance from said Richard's father Abraham Young and also excepting all the interest which said Brook W. Young had in the lands of which Elizabeth Wheeler and John Young died seized and further saving and excepting from this conveyance so much of all the land and tenements above mentioned as had been conveyed by the party of the first part to other persons prior to the filing of the bill in equity cause 11637 (Cox *vs.* Walter) of the supreme court of the District of Columbia and excepting also all real estate released from the operation of said cause. This conveyance however, including all the right, title and interest of the party of the first part in the lands and tenements which by the decree in equity cause 10826 (Walter *et al. v.* Bevans *et al.*) of said court were vested in said Walter and one Guion Miller upon the trusts in said decree declared, so far as the said Walter is in his own right a beneficiary of said trust (it not being the meaning of this conveyance to convey the title held by him as trustee) excepting such of said real estate as has been released from the operation of said equity cause, 11637, together with — and singular the improvements, ways," etc.

Also a deed from Bartow L. Walker, dated November 1st, 1894, and recorded among said land records on December 11th, 1894, to Paul J. Brandt, conveying to him all said Walker's right, title, and interest in and to all real estate situate in the District of Columbia; also a deed from said Paul J. Brandt, unmarried, to the Virginia-Alabama Company, dated December 29th, 1894, and duly recorded among said land records on December 29th, 1894, conveying to said company, in fee, all of said Brandt's interest in all real estate in the District of Columbia, and then offered evidence tending to prove the incorporation, on the 18th day of December, 1894, under the general incorporation laws of the State of Virginia, of the said Virginia-Alabama Company, one of the plaintiffs in this cause, with authority, among other things, "to acquire, hold, own, and dispose of real estate in fee-simple and less estates, including equities and undivided interests therein, by grant, purchase, voluntary conveyance, sale, exchange, lease, and otherwise."

Thereupon FRANKLIN H. MACKEY, Esq., a witness produced on behalf of the plaintiffs, testified that he was counsel for the plaintiff in equity suit No. 11637, Samuel Cox *et al. vs.* John H. Walter

8 *et al.;* that he had represented the complainants ever since; that he entered no order in said cause releasing lot 10, in square No. 1031; and thereupon the said witness was asked on behalf of the plaintiffs the following question:

Q. Mr. Mackey, did you, as solicitor for the complainants in that cause, file releases of property?

To which question the defendants, by their counsel, objected on the ground that the record of the cause in question was the only competent proof of what releases were filed therein, and the court sustained the said objection; to which ruling of the court the plaintiffs then and there excepted.

And the plaintiffs thereupon offered in evidence the record of the proceedings in said equity cause No. 11637 for the purpose of showing that there was no release of lot 10, in square No. 1031; which record and proceedings tended to show that certain lots had been released, but that said lot 10 had not been released from the effect and operation of said cause.

Thereupon JOHN H. WALTER, a witness produced by and on behalf of the plaintiffs, testified in chief only that his name was John H. Walter, and that the deed from himself to Charles M. N. Latimer, Lucy T. Davis, Ella M. Cox, and Mary E. Magruder, dated October 25, 1892, was the only conveyance he ever made in reference to the said lot 10; whereupon, against the objection of the plaintiffs that said cross-examination was not responsive to the examination-in-chief and subject to their separate exception to each and every part of said cross-examination, the said witness was cross-examined, and testified that he had lived in the District of Columbia about thirteen years, during six or seven of which he had been in the real-estate business; that the deed conveying said lot 10 to him conveyed also about fifty other lots, and that he did not remember how many conveyances he had made with respect to these lots; that he had not reviewed his said conveyances recently; that he had probably made ten or a dozen deeds in reference to them, but never conveyed lot ten away except by the deed to Latimer, Magruder, Davis, and Cox, but, upon being interrogated in regard thereto, testified that he had conveyed a certain interest in that lot to B. L. Walker; that he remembered that deed well enough, but that he thought the question had reference to what he had done with his property since the suits were filed; that it would be impossible for him to tell how many deeds he had made of property which he had acquired by buying the title of heirs of men long since dead; that he had probably made fifty deeds; he did not think two hundred of them, but would not swear there were not two hundred; that the deeds to him and from him frequently included large quantities of property; it would be impossible for him to say how many lots; that his deeds from the alleged heirs of one George Walker and conveyances from him based upon said deeds probably included a hundred lots, parts of lots, or whole squares in the city of Washington, though he thought not so many as two hundred; that one of his deeds included the entire square of

9 ground containing St. Aloysius church, Gonzaga college, and some forty dwelling-houses; that he has never had any occasion to review the deeds made by him in these various matters, but he claimed to be able to say as to lot 10, out of all these lands or lots, that he had made no deeds affecting it other than those above mentioned.

The attorneys for the plaintiffs objecting that the foregoing is not a fair summary of the cross-examination of the witness Walter, at their request the whole of his cross-examination as it occurred and his redirect examination is hereto annexed, and each objection and exception made and taken thereto and the action of the court thereon is saved to the plaintiffs and made part of the record and of this bill of exceptions.

Cross-examination of JOHN H. WALTER.

By Mr. DARLINGTON:

Q. Mr. Walter, where do you live?

Objected to. Objection overruled and exception noted.

Q. Where do you reside?
A. I now reside at No. 616 9th street N. E.
Q. How long have you lived in Washington?
A. Twelve years.

Mr. MACKEY: I object to this line of examination as not responsive to the direct examination.

The COURT: The rule is that where a witness has been examined by a party who relies upon his evidence the other party in cross-examination may inquire into anything that may reasonably tend to throw light upon the weight that the jury may attach to the testimony of the witness. I think Mr. Darlington has the right to inquire into where this witness lives, and how long he has lived here, and who he is and what he is in order that the jury may know what sort of a man he is and what weight to attach to his testimony.

Mr. MACKEY: I note an exception.

By Mr. DARLINGTON:

Q. The question is, How long have you lived among us?
A. Some fourteen years, with the exception of about a year.
Q. What has been your occupation during that time?
A. I was a Government employee for a part of the time and in the real-estate business a portion of the time.
Q. What class of real-estate business?
A. I didn't know that the business was classed; that there were any classes in the real-estate business.
Q. Tell us what your real-estate business consisted in, if you do not understand the form of my question.
A. Buying and selling real estate.
Q. Buying what kind of titles, Mr. Walter?
A. That is for the title company to say, whether the titles were good.

10 Mr. MACKEY: I object to that question.
The COURT: I do not see that it has any materiality.

By Mr. DARLINGTON:

Q. You say you have never made any conveyance of lot 10, in square 1031?

Mr. WILLIAMS: He did not say that.

Q. Unless this deed here conveys it?
A. I made that deed, and that is the only one.
Q. You acquired the title that you have to that lot along with a great many other lots, did you not?

A. Objected to. Objection overruled and exception noted.

Q. There were a number of lots included in the deed.
Q. What deed do you refer to?
A. The deed conveying to me, in which this lot was included.
Q. The deed conveying this lot 10 to you?
A. Conveying the property in which that was included; yes, sir.
Q. You mean a deed to you?
A. Yes, sir.
Q. That conveyed quite a number of other lots?
A. Yes, sir.
Q. How many?

Objected to. Objection overruled and exception noted.

By Mr. DARLINGTON:

Q. There were a good many lots included in these deeds from the Young heirs to you—about how many?
A. I should say in the neighborhood of fifty.
Q. What have you done with those lots? How many conveyances have you made with respect to them?

Mr. MACKEY: I object to that.
The COURT: The last question would be proper, I think—how many conveyances he has made.
Mr. MACKEY: I simply want to keep the record straight. I note an exception.

A. The record will show. I really don't remember.
Q. Why not?
A. I really don't remember how many.
Q. You have not reviewed them recently?
A. What interest could I have in it now, after making that conveyance?
Q. My question is whether or not you have recently reviewed the deeds which you have made of various Young——
A. No, sir.
Q. You cannot give us any idea as to how many deeds you made in respect to those fifty lots?
A. I really don't know. I could make a guess; probably ten or a dozen.

11 Q. How are you able to say that lot 10 is not among some of those conveyances which you cannot remember?

Objected to. Objection overruled and exception noted.

A. I know that I never conveyed it.

Q. You are positive about that, are you?

A. I am positive about that.

Q. The only deed you ever made affecting this lot 10 is the deed to Latimer and Magruder and Davis and Cox?

A. I never conveyed it away, with that exception.

Q. Did you not make a deed to B. L. Walker for a half interest in all the property you had under the Young title?

Mr. WILLIAMS: I submit the witness ought to be shown the deed.

The COURT: Perhaps Mr. Walter remembers it well enough without being shown the deed.

A. I remember it well enough, your honor. I thought this question had reference to what I had done with this property since the suits were filed.

Mr. MACKEY: The question did have reference to that.

Mr. DARLINGTON: No; the question was whether he had made a deed to B. L. Walker for a half interest in all the property he had under the Young title.

A. I did make a deed to Bartow L. Walker for a certain interest in what I obtained through those deeds.

Q. You did not recall that when you said you had made no deed That was a slip of the memory?

A. I thought it had reference to the time since these suits.

Q. Why did you think that? There was nothing in the question that referred to the suits, was there?

A. That matter was all adjusted in that suit, Walker's interest and everything, and this particular deed referred to there was as to what interest remained in me; what I still held of that title. I thought that was the starting point.

Q. In this deed you except from it all property which you conveyed away to others?

A. All property which I conveyed away to others.

Q. There is no reference to any suit in the deed, is there?

A. No.

Mr. MACKEY: I object to this line of examination as not responsive to the examination-in-chief and as having no bearing on the issue.

The objection was overruled and an exception noted.

By Mr. DARLINGTON:

Q. You say your business has been buying and selling real estate. During how many years?

A. About six or seven years; something like that.

Q. Can you tell us approximately how many pieces of real estate you have made deeds to in that time?

12 A. I would be impossible.
Q. Why?

Objected to. Objection overruled and exception noted.

By Mr. DARLINGTON:

Q. Why is it you cannot remember about how many deeds you have made?

A. Because it has extended over a period of six or eight years; maybe longer than that—ten years. I conveyed a lot of property while I was in the Government office. I bought and sold property, dealt in property generally, while I was in Government office, for nine years, and since I have been out of the service I have made a good many deeds.

Q. About how many deeds of this character have you made?

A. I don't know what you have referred to.

Q. I mean where you bought the interest in property from heirs, as in this case—heirs of persons long since dead.

A. I never made any deed of this character that I know of.

Q. About how many deeds have you made of property which you acquired by buying the title of heirs of men who had been dead a long time?

Objected to. Objection overruled and exception noted.

A. It would be impossible for me to say. Really, I don't know.

Q. Is it because they have been so numerous?

A. Partly, and partly on account of the time.

Q. Can you come within a hundred of the number?

A. I presume I could.

Q. Come as near as you can to it. We do not hold you down to any exact number, but come with- a hundred of it, if you can.

A. Probably fifty. I really don't know. It is simply guessing.

Q. Fifty deeds?

A. Yes.

Q. Do you think you have not made over two hundred deeds within that time?

A. I hardly think so.

Q. Is your recollection on the subject such as to be able to swear that you have not made over two hundred deeds?

A. No; I wouldn't swear that I hadn't.

Q. Among all these deeds you have made you think you could remember distinctly that this deed here is the only one in which you conveyed lot 10?

A. With the exception, probably, of that to Walker. That is the only deed that I have made of the interest that I acquired after the suit involving the title to the property—the suit that was filed for straightening up the title to the property.

Mr. DARLINGTON: I would like to ask this witness something about his transactions in this property, how he came to undertake it, &c., but I presume I will not be permitted to do so.

The COURT: It does not seem to me that is proper.

13 By Mr. DARLINGTON:

Q. Mr. Walter, you not only made a good many deeds, but the deeds you have made have included a great many pieces of property, have they not—that is, a single deed would include large quantities of property, would it not?

The COURT: You mean a good many lots?
Mr. DARLINGTON: Yes.

A. Deeds that I have made?
Q. Yes; deeds to you and deeds from you have included large lots of ground, have they not?
A. Quite a number of pieces.
Q. I think you say in this case here that there were about fifty lots embraced in this deed?
A. In the neighborhood of fifty.
Q. Is this exceptional—that is, are there any other conveyances to you which included the same or a larger number of lots?

Objected to. Objection overruled and exception noted.

By Mr. DARLINGTON:

Q. Your conveyances in this property included many deeds which embraced large lots of ground, did they not?
A. I don't understand the question.

Objected to. Objection overruled and exception noted.

By Mr. DARLINGTON:

Q. My question is whether the deeds to you and from you, the deeds with which you have been concerned, have not, many of them, been deeds which conveyed a great many lots.
A. Some of them have.
Q. About how many lots altogether?
A. It would be impossible for me to say.
Q. Approximate it as near as you can.
A. It would be guessing on my part, and the record will show exactly how many lots I have conveyed.
Q. We have not time to go into the record. Is it not a fact that in the Walker deeds alone you have had conveyances to you and from you of more than a hundred squares and parts of squares in this city?

Objected to. Objection overruled and exception noted.

By Mr. DARLINGTON:

Q. You know what I mean by the Walker title, do you not, Mr. Walter—George Walker, who lived about eighty or ninety years ago here?
A. The record shows that such a man did live.
Q. I will ask you if in your transactions with that title alone there have not been lots, squares, and parts of lots and squares in this city deeded to you and many deeds from you again.

14 A. It has been quite a number of years since any deeds of that character were made to me. I have made deeds of it.

Q. These go back to 1886. Your transactions with the Walker title were since that time?

A. About that time.

Q. Is it not a fact that in that transaction alone there were some two or three hundred deeds of lots or parts of lots or whole squares in your name and conveyed by you away in this city?

A. I wouldn't think there was as many as 200; no, sir.

Q. How many? Approximate it as near as you can.

A. There may have been a hundred.

Q. You were also concerned with the Orr title, were you not?

A. Concerned with it?

Q. Yes; took deeds from it and made deeds of it.

A. I took some deeds from the heirs of Orr.

Q. Were there not many lots and parts of lots in single deeds made over to you in that instance?

A. There were a number of lots.

Q. One of these deeds was a deed of a whole square of ground containing St. Aloysius church, Gonzaga college, and some forty dwelling-houses, was it not?

A. Yes.

Q. Altogether can you approximate the number of squares and lots and parts of lots that you have bought up in this way and made deeds of?

A. I don't understand your question when you say bought it in this way. Please explain what you mean by "bought in this way."

Q. I mean like the Walker title, like the Young title, like the Orr title, and other claims of that sort.

A. All property that I bought I paid for.

Q. I am not asking as to that. I am asking as to the number of lots you have bought and made conveyances of under this kind of title.

A. I have already said it would be impossible for me to state the number without looking up the record.

Q. Can you come within two or three hundred of it? Can you say whether there were five hundred, eight hundred, or a thousand?

A. I shouldn't think it would be as many as two or three hundred.

Q. How long has it been since you reviewed your deeds in these various matters?

A. I haven't had occasion to review the deeds at all.

Q. Yet you claim to be able to pick out lot 10, out of all this mass of lots, and say you have not made a deed of it?

A. I say I have not.

15 Redirect examination.

By Mr. MACKEY:

Q. You are able to say that in respect to this particular Richard Young title that you never made any conveyance of lot 10 except that mentioned in this deed?

A. I have never made any conveyance of the interest that I acquired under the suit. In that case I acquired certain interests, and then a bill was filed to perfect the title, and by decree of the court certain lots were allotted to me, and, as to other lots, trustees, Mr. Miller and myself, were appointed to dispose of these lots. This was one of the lots that came to me in that division—came to Miller and myself as trustees—and since then I have never made any disposition of the lots, with the exception of that one deed. Previous to the filing of that suit, I will say, there were some conveyances made. B. L. Walker was my partner in the real-estate business, and a certain interest was conveyed to him, previous to the filing of that suit, for a partition of the lots. That is the reason I stated I never made any conveyance. I thought it had reference to my getting the whole title or the settlement under that suit, in which certain lots were allotted to myself and certain other lots to certain heirs. We didn't make any conveyances at all; but since that time the only conveyance I have made in reference to this lot is the conveyance referred to in the question first asked me.

Thereupon the plaintiffs further offered in evidence the original decree passed in the supreme court of the District of Columbia, holding a special term for equity business, in the cause entitled John H. Walter *et al. vs.* Tracenia Bevans *et al.*, equity, No. 10826. Among other things said decree contained the following:

"It appearing to the court that the time limited in the order *nisi* passed in this cause on the 21st day of March, 1888, has expired, and that no exceptions have been filed to the return of the commissioners to make partition, filed on said day, it is, this 4th day of April, 1888, adjudged, ordered, and decreed that said return and partition made by said commissioners be, and they are hereby, finally ratified and confirmed."

* * * * * * *

"And it appearing to the court from said return that the real estate described in paragraph 10 of the bill in said cause cannot be specifically divided among the parties interested without loss and injury to them, nor can the same be advantageously sold except as hereinafter stated, it is further adjudged, ordered, and decreed that John H. Walter and Guion Miller be, and they are hereby, appointed trustees, with authority to bring such suits as may be necessary to assert the rights of the parties to this cause in and to said real estate, to wit, original lot 9, square 1033; lots 5, 9, 10, and 12, in square 983; lot 10, square 1031; lots 4 to 13, square 1108; lots 8 and 9, square 1119; lots 5 and 6, square 1120, and lot 5, square 1122, in the said city and District; to make such public or private sales and effect such compromises and make such convey-

16 ances as may be approved by the court, and for these purposes the said trustees are vested with all the title of the parties to this cause in the said real estate last hereinbefore referred to, provided that before acting as such trustees the said Walter and Miller shall each file in this cause his separate bond to the United States of America in the penalty of two thousand dollars, conditioned in due form, for the faithful performance by said trustees of the trusts reposed in them by this decree or any further decree in this cause.

W. S. COX, *J.*"

* * * * * * *

Plaintiffs, for the purpose of showing that the defendants claimed title to the property in question from a common source of title, offered in evidence the records of certain deeds on file among the land records of the District of Columbia, the plaintiffs, however, denying that said deeds vested in the defendants or either of them any title to said lot as against the plaintiffs, and the plaintiffs reserved in said offer the right to impeach at the proper time any of said deeds. The deeds so offered in evidence were, first, a deed from Tench Ringgold, U. S. marshal, to Anthony Holmead, Jr., dated March 8, 1826, and recorded in Liber W. B. 16, folio 259, one of the land records of the District of Columbia, which said deed recited a judgment in favor of said Holmead against Richard Young on the first Monday in June, 1819; issuance of a writ of *fieri facias* thereunder February 28, 1820; levy and sale by the marshal of the said lot 10, square 1031, to the grantee, Anthony Holmead, Jr., on the 31st of July, 1820. This deed was followed by evidence of other deeds showing a consecutive chain of conveyances of said lot 10, square 1031, from said Anthony Holmead, Jr., of the title so acquired by him under said marshal's deed to the defendants in this case as trustees.

Plaintiffs then offered in evidence as a part of the aforegoing offer the record of a certain deed of trust upon said lot 10 and other property to secure the indebtedness therein recited from Richard Young to William A. Bradley, trustee, dated November 2, 1818, and recorded December 18, 1818, in Liber A. T., folio 331, one of the land records of the said District; which said trust recited, among other things:

"Witnesseth that whereas the said Richard Young now stands indebted unto James B. Holmead of the said city in the sum of seventeen hundred and ninety-two dollars current money and the said Richard Young is desirous of securing the punctual payment of the said debt with interest on or before the second day of November eighteen hundred and twenty in consideration whereof and of the sum of one dollar current money," etc.

Plaintiffs then rested.

Thereupon the defendants, to maintain the issues upon their part joined, produced as a witness on their behalf J. W. LATIMER, an employee of the clerk's office of the supreme court of the District of Columbia, who testified that he had direct charge of all of the

17 old papers relating to lawsuits, and that the original papers in the suit of Anthony Holmead *vs.* Richard Young, instituted at the June term, 1819, were lost, and after diligent search could not be found.

Whereupon, against the objection of the plaintiffs, overruled by the court, and subject to their exception, the defendants offered in evidence the docket entries of the late circuit court of the District of Columbia touching the said suit as tending to prove the recovery of a judgment in said cause of twelve hundred dollars, interest and costs; the issuance of a *fi. fa.*, levy, and partial satisfaction of the judgment by execution and sale.

Thereupon JOHN RIDOUT, Esq., called as a witness on behalf of the defendants, testified that he was a member of the bar, and that as such he had examined the original papers in said cause before they were lost, and that they showed levy upon the said lot 10, among other lots, under the *fi. fa.* in said cause. Said docket entries are as follows:

"*Imparlance, June Term*, 1819."

"Wallack. 698. P. P.	1818. Dec. 18.	Anthony Holmead *v.* Richard Young. 1065. *Fi. fa.*, June term, 1820. No. 79.	Case was three notes. Jas. B. Holmead spl'a. by order, rule — plea. Judgment by default for $1,200, with int.—on $400 with int. from 21 Nov., 1817; on 400 with int. from 21st Dec., 1817; on $400 with int. from 21 Jan'y, 1818. Protests, $5.10."

"*Judicials, June Term*, 1820."

Wallack. 79.	1820. Feb'y 28th	Anthony Holmead *v.* Richard Young. 698. Imps. June, 1819.	*Fi. fa.*; dams., $1,200; ints. on $400 from 21st Nov., 1817; on $400 — 21st Dec., 1817; on $400 from 21st January, 1818, are pd., &c. Costs, $11.74; add E. O. 91. Levied as per schedule & satisfied pl'tiffs to am't of $911.60, as per rect. on writ.

The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs & grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22nd day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of

18 which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase-money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October without the consent of the defendants, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'4, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the brick were removed when they left; that these brick were in process of removal along during the winter of 1893–'94, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine-house was located on the north part of lot 1, in said square, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to the jury, and that the rollers and machinery were north of the machine-house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"I don't know but what the rollers might have been on lot 10. The machine-house stood right in here (indicating), and the rollers might have been on lot 10."

The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old brick were left on the ground, which the witness thought Childs & Sons abandoned, but they did not charge defendants for them, which were suitable for use in building, and were still there; that defendants made no use of them, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base-ball park, but did not use it for that purpose; that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool-boxes, and railroad iron on the square, though none was attempted to be deposited on lot 10; that on the said square there were a couple of

19 holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid, until June, 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs & Sons left the square, which was in the winter of 1893–'4, perhaps along in November, December, January, and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; that said James D. Childs did not claim the land said bricks were on; that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, though she made no use of it herself.

The defendants thereupon produced as a witness in their behalf GOFF A. HALL, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894.

And thereupon, both sides having announced their testimony closed and the foregoing being all the evidence given by the respective parties, the plaintiffs, by their counsel, asked the court to instruct the jury as follows:

Instruction No. 1.

The jury are instructed that the uncontradicted evidence in this case shows that Childs entered in the possession of the lot in controversy not earlier than the eight- day of March, 1875, and continued in such possession until about November, 1893, when he vacated said lot and square 1031, having about a year previously made a deed of said lot to the defendants in this case, and that there is no testimony in this case that said lot 10 was in continuous occupancy of any one from the period of such vacation by Childs down to the seventh day of March, 1895, and therefore the defendants in this case have not shown such an adverse possession of said lot 10 by themselves and said Childs, under whom they claim, for the full period of twenty years, and their verdict must therefore be for the plaintiffs.

But the court refused to grant said instruction; to which ruling plaintiffs, by their counsel, before the case was given to the jury, then and there excepted and prayed the court to note their excep-

20 tion upon its minutes, and the same was done and made a part of this record.

Plaintiffs then asked the court for leave to amend their declaration in the following form:

"The plaintiffs hereby move the court for leave to amend their declaration by striking therefrom the following parties plaintiff: William W. Boarman and Charles M. N. Latimer;" which was by consent of counsel for defendants accordingly by the court allowed.

The plaintiffs then request- the court to instruct the jury as follows:

Instruction No. 2.

The jury are instructed that the plaintiffs have proven a *prima facie* record title to the lot in controversy down to the time of filing of their suit; and they — further instructed that in order to divest the plaintiffs of their said record title to said lot 10 the defendants in this case must show a continuous possession by themselves and Childs of said lot 10 for the full period of twenty years from the eight- day of March, 1875, and that such possession must not only have been continuous, but it must have been actual, exclusive, open and notorious, and hostile to the plaintiffs in this case for said period of twenty years; that if at any time during said twenty years said lot 10 was not in the actual occupancy, as stated, of Childs or some one claiming under him, then the defendants have not established such an adverse possession of the property, and there is no evidence in this case tending to show an adverse occupancy or possession by the defendants or their tenants from the time Childs vacated said lot 10 down to the seventh day of March, 1895, as the law requires, and they must find for the plaintiffs.

But the court refused to grant said instruction; to which ruling plaintiffs, by their counsel, and before the case was given to the jury, then and there excepted and prayed the court to note their exception upon its minutes, and the same was done and made part of this record.

The plaintiffs then requested the court to instruct the jury as follows:

Instruction No. 3.

The jury are instructed that the defendants in this case claim title with the plaintiffs from a common source, to wit, from Richard Young. The defendants are therefore not permitted to deny, nor can the jury find, that said Richard Young was not the owner of this lot 10 at the time of the marshal's deed to Holmead, and that the said deed of the marshal to Holmead is void and passed no title to Holmead or to any person claiming under him. As the defendants therefore claim under Richard Young, through said Holmead, their paper or record title is invalid, and the only title, if any, which they can show to this lot 10 is a title by adverse occupancy for the full and uninterrupted period of twenty years, as defined in instruction No. 2, and that there is no evidence in this case to show

21 such adverse occupancy for said twenty years, and that their verdict must therefore be for the plaintiffs.

But the court refused to grant said instruction; to which ruling plaintiffs, by their counsel, and before the case was given to the jury, then and there excepted and prayed the court to note their exception upon its minutes, and the same was done and made a part of this record.

Plaintiffs then requested the court to instruct the jury as follows:

Instruction No. 4.

The jury are instructed that no adverse possession of lot 10 has been shown against any of the plaintiffs who claim under Tracenia Latimer and Elizabeth T. B. McCormick, and their verdict must therefore be for the plaintiffs, at least as to the interests which they claim under those persons.

But the court refused to grant said instruction; to which ruling plaintiffs, by their counsel, and before the case was given to the jury, then and there excepted and prayed the court to note their exception upon its minutes, and the same was done and made a part of this record.

Plaintiffs then requested the court to instruct the jury as follows:

Instruction No. 5.

The jury are instructed that they cannot find that the machinery was on any part of lot ten from the testimony of a witness who says, "I don't know but what the rollers might have been on lot 10."

But the court refused to grant said instruction; to which ruling plaintiffs, by their counsel, and before the case was given to the jury, then and there excepted and prayed the court to note their exception upon its minutes, and the same was done and made a part of this record.

Plaintiffs then requested the court to instruct the jury as follows:

Instruction No. 6.

The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot ten, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis, and others, and the jury would not be justified in finding to the contrary."

But the court refused to grant said instruction as prayed, but modified it by striking out the words "and the jury would not be justified in finding to the contrary" and by adding in lieu thereof the words "and the weight to be given his testimony is a proper question for the jury." To which ruling of the court in refusing to grant said instruction as prayed the plaintiffs, by their counsel, and before the case was given to the jury, then and there excepted and prayed the court to note their exception upon its minutes, and the same was done and made a part of this record.

22 The court then instructed the jury as follows:

Charge to the Jury.

GENTLEMEN OF THE JURY: The instruction- which I have consented to grant on one side and the other, which will control your verdict, under the evidence as you may find it in the case, are as follows:

The one I now read you is granted in behalf of the plaintiff-:

The jury are instructed that the identity between the names Abraham Young mentioned in the allotment between the United States and one Abraham Young and the Abraham Young testified in this case as the father of Richard Young is *prima facie* evidence that they were the same person, and there is no testimony in this case tending to rebut that presumption, and the same is true in regard to the Richard Young testified in this case as being the ancestor of some of the plaintiffs and the Richard Young testified as being the son of said Abraham Young.

That goes to the identity of the parties from whom the title here is claimed to be derived by the plaintiffs.

The next instruction is also granted at the request of counsel for the plaintiff-:

The jury are instructed that there is no testimony in this case controverting the testimony that Abraham Young was the father of Richard Young and the other persons testified to as being the children of said Abraham Young, nor is there any testimony controverting the testimony of the plaintiffs that the said plaintiffs are the descendants of Richard Young or grantees of such descendants. The jury would therefore not be justified in finding to the contrary.

And the next instruction is also granted at the request of the plaintiffs:

The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot ten, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis, and others (and the weight to be given his testimony is a proper question for the jury).

The next instruction I give you is granted on behalf of the defendants, at the request of their counsel, and reads in this way:

(If the jury believe from the evidence that the defendants and those under whom they claim were in actual, exclusive, open, notorious, continuous, and hostile possession of the ground in controversy in this suit for twenty years before the institution of this suit, claiming it as their own, their verdict should be for the defendants.)

And the next is also given on behalf of the defendants:

(Unless the jury shall find that each of the plaintiffs, under the plaintiffs' declaration as amended, is entitled to recover, their verdict should be for the defendants.)

That is to say, gentlemen, if you should find some one of the plaintiffs was entitled to recover but others of the plaintiffs were not

23 entitled to recover, you could not find in favor of the plaintiff that is entitled to recover and for the defendants as to the other plaintiffs, but you would have to find a general verdict for the defendants.

The next instruction is granted on behalf of the plaintiffs, at the request of their counsel, and reads as follows:

The jury are instructed that no possession of any portion of square 1031 is an adverse possession against the plaintiffs in this suit unless such possession was actually extended to lot 10 for the full, uninterrupted period of twenty years prior to the institution of this suit.

Well, gentlemen, that concludes the series. As you will observe, the main question to be determined by you is this question of adverse possession, and the evidence is brief, and you will be able, I think, to come to a satisfactory conclusion from that.

Mr. MACKEY: I suppose both sides have the liberty of excepting to such portions of the charge——

The COURT: I have given no charge.

Mr. MACKEY: Well, the prayers and your modifications of any prayers.

The COURT: Oh, certainly.

And to so much of said charge as is contained in brackets the plaintiffs, by their counsel, then and there severally excepted and prayed the court to note the said exceptions upon its minutes, which was done, and the same are made a part of the record herein. Thereupon, the case being given to the jury, a verdict was rendered for the defendants, and after motion for a new trial, made by the plaintiffs within the time prescribed by rules of court, had been overruled, judgment was entered thereon according to the tenor of said verdict. Wherefore the plaintiffs, by their counsel, having now prayed the court to sign this their bill of exceptions, the same is accordingly done this fifth day of May, 1897, now for then.

CHAS. C. COLE,
Asso. Justice. [SEAL.]

Stipulation Extending Time to File Transcript 30 *Days.*

Filed May 7, 1897.

In the Supreme Court of the District of Columbia, May 6th, 1897.

CHAS. M. N. LATIMER ET AL.
vs.
LOUIS COBLENS, Trustee, ET AL. } Law. No. 38058.

It is hereby stipulated that the time for filing the transcript in this cause is to be considered as extended thirty days from this date.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Plaintiffs.
J. J. DARLINGTON,
For Appellee.

24 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 39, inclusive, are true copies of originals in cause No. 38058, at law, wherein Lucy T. Davis *et al.* are plaintiffs and Louis Coblens *et al.* are defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of May, A. D. 1897.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 694. Lucy T. Davis *et al.*, appellants, *vs.* Louis Coblens and Martin Lauer. Court of Appeals, District of Columbia. Filed Jun- 4, 1897. Robert Willett, clerk.

25 TUESDAY, *October 19th, A. D.* 1897.

LUCY T. DAVIS, MILLARD P. MCCORMICK, and VIRGINIA-Alabama Company, Appellants, *vs.* LOUIS COBLENS and MARTIN LAUER. } No. 694.

The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellants, and was continued by Mr. J. J. Darlington, attorney for the appellees, and was concluded by Mr. F. H. Mackey, attorney for the appellants.

26 *Opinion.*

LUCY T. DAVIS, MILLARD P. MCCORMICK, and VIRGINIA-Alabama Company, Appellants, *vs.* LOUIS COBLENS and MARTIN LAUER. } No. 694.

Mr. Justice SHEPARD delivered the opinion of the court:

1. This was an action of ejectment brought to recover the possession of part of lot 10 in block 1031 of the city of Washington, and the appellants, who were the plaintiffs below, appeal from a judgment against them. They claim as heirs-at-law and grantees of heirs-at-law of Richard Young, who is the common source of title. Defendants and their grantors claimed title under an execution sale upon a judgment against said Richard Young some time in the year 1826. The conveyance under that sale was a nullity because at the

time of the levy and sale the defendant in execution had but an equity of redemption in the lot. Van Ness *v.* Hyatt, 13 Pet., 294; Mayse *v.* Gaddis, 2 App. D. C., 20, 26. Consequently, defendants had to fall back upon a claim of title by adverse possession, upon the evidence of which the jury found for them.

The chief point of the contention is in respect of the sufficiency of this evidence to warrant its submission to the jury; but before considering that, several preliminary points require determination.

2. The first of these arises on an exception taken to the latitude of cross-examination permitted by the court of one of plaintiffs' witnesses. The title to a part of the lot in controversy had once been conveyed by some of the heirs of Richard Young to one John H. Walter, who had subsequently reconveyed to some of the plaintiffs. The deed was a general conveyance of lands and interest therein, including lot 10 aforesaid, by reference to another deed, and contained a clause, "saving and excepting from this conveyance so much of all the lands and tenements above mentioned as had been conveyed by the party of the first part (said Walter) to other persons prior to," &c.

Walter was offered as a witness to prove that lot 10 had not been conveyed by him to any one else. He testified from memory without having refreshed the same by an examination of the records. The cross-examination took a wide range in respect of the many conveyances the witness had made within a few years, and the plaintiffs objected thereto because it was not responsive to the examination-in-chief and was not relevant to the issues. The objection was overruled. The latitude to be indulged in the cross-examination of a witness for the purpose of testing his credibility varies with the particular circumstances of the case, and is like that in respect of leading questions, a matter necessarily very largely within the discretion of the trial court. Holtzman *v.* Douglass, 5 App. D. C., 405. The complaint here made is that the cross-examination was chiefly for the purpose of showing that the witness was a dealer in speculative titles, in order to prejudice the jury against him, and through him against the case of the plaintiffs. If such was the purpose, it would have been the duty of the court to repress it. But whilst we are inclined to think that the cross-examination went too far, we cannot say that there was an abuse of discretion in permitting it that would justify the reversal of the judgment. Besides, even if there had been error it would be immaterial. The case evidently turned upon the issue of adverse possession, and this witness did not testify in respect thereof at all. His testimony could have had no appreciable effect upon the result. W. & G. R. Co. *v.* McLane, 25 Wash. Law Rep., 485; Glenn *v.* Sumner, 132 U. S., 152, 157.

3. Another error is assigned on the modification of an instruction asked by plaintiffs in respect of the evidence given by the said witness, John H. Walter.

The instruction was, that as there was no testimony tending to rebut the evidence of the witness as to the fact that he had never conveyed lot 10 to any one before his deed to the plaintiffs, "the jury would not be justified in finding to the contrary." The court

struck out these last words, and substituted therefor the following: "The weight to be given his testimony is a proper question for the jury." Ordinarily, instructions singling out the evidence of a particular witness ought to be avoided. The court has no right to instruct the jury that they must believe an uncontradicted witness, notwithstanding it might be improper for them not to do so, under all the circumstances, and it was not error to inform them that the weight to be given his testimony was for their consideration, although it would have been better practice to refuse the charge as asked, and omit all reference to the witness. Met. R. Co. *v.* Jones, 1 App. D. C., 200, 207. For the same reasons given in discussing the exceptions taken to the cross-examination of the same witness, if error were conceded, the judgment would not be reversed therefor.

27

4. The next assignment of errors is founded upon the alleged insufficiency of the evidence of adverse possession, to warrant the submission of that question to the jury. No objection is taken to the charge on account of its form; but the contention is that the only instruction proper to be given was to find for the plaintiffs, as requested by them. The substance of that evidence is set out in the bill of exceptions as follows:

"The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs and grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22d day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase-money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October without the consent of the defendants, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'94, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the brick were removed when they left; that these brick were in process of removal along during the winter of 1893–'94, and that a part of the machinery used by them in the making of brick, namely, two large

rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine-house was located on the north part of lot 1, in said square, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to the jury, and that the rollers and machinery were north of the machine-house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"'I don't know but what the rollers might have been on lot 10. The machine-house stood right in here (indicating), and the rollers might have been on lot 10.'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old brick were left on the ground, which the witness thought Childs & Sons abandoned, but they did not charge defendants for them, which were suitable for use in building, and were still there; that defendants made no use of them, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base-ball park, but did not use it for that purpose; that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool-boxes, and railroad iron on the square, though none was attempted to be deposited on lot 10; that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid, until June, 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs & Sons left the square, which was in the winter of 1893–'94, perhaps along in November, December, January, and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; that said James D. Childs did not claim the land said bricks were on; that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, though she made no use of it herself.

"The defendants thereupon produced as a witness in their behalf GOFF A. HALL, assistant assessor of the District of Columbia, who

gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

In addition, it was shown that the defendants and those under whom they claimed had paid all the taxes assessed against the said lot 10 from year to year, since 1875. The testimony re-
28 quires no review. Though somewhat meagre as regards the last two of the required twenty years of adverse possession, we are of the opinion that, in connection with the proof of the regular payment of taxes by the defendants, the evidence was sufficient to warrant its submission to the jury. The case is not distinguishable from Holtzman *v.* Douglass, 5 App. D. C., 397, 412; S. C., Supreme Court U. S., November, 1897.

5. The next question, is: Conceding the proof of twenty years' adverse possession by defendants, could the statute of limitations be said to have run against the plaintiffs' title acquired through Tracenia Latimer and Elizabeth McCormick?

An instruction embodying a negative answer was refused as to both, and error is assigned thereon.

As we have seen above, defendants' adverse possession began on February 22, 1875. Richard Young, the common source of title, died July 30, 1860, leaving a will. After making certain specific devises, none of which included lot 10, he devised the residue of his estate to his widow Matilda for life, with remainder in fee to his five children, including the said Tracenia and Elizabeth. Both these were married at that time. Tracenia died November 15, 1879, and her husband, April 20, 1880. She left two children, one of whom is the plaintiff, Lucy T. Davis. Lucy Davis was married before the death of the life tenant, Matilda, which occurred October 7, 1874.

Elizabeth married before her father's death, and died March 22, 1889, leaving a husband, who died July 2, 1891. October 14, 1887, the said Elizabeth and her husband conveyed their interests to their son, the plaintiff, Millard P. McCormick. This suit was begun May 17, 1895.

(1) As the estates of Tracenia Latimer and Elizabeth McCormick vested before the passage of the act defining the separate property rights of married women, and permitting them to convey, devise and bequeath the same, and to contract, sue and be sued in matters having relation thereto, in the same manner as if unmarried (R. S. D. C., sections 727, 728, 729), their husbands' rights by the curtesy and their own disabilities in respect of the conveyance thereof, were not removed. Hitz *v.* Nat. Met. Bank, 111 U. S., 722, 729, 730; Hitz *v.* Jenks, 123 U. S., 297; Kaiser *v.* Stickney, 131 U. S., Appendix

CLXXXVII; Cammack *v.* Carpenter, 8 App. D. C., 219, 227; Frey *v.* Allen, 9 App. D. C., 400, 404.

Nor, for the same reason, could the wife have brought an action of ejectment in her own name, or without joinder of her husband. White *v.* Hilton, 2 Mackey, 339, 344.

It follows, therefore, that both of the married women aforesaid were within the provisions of the saving clause of the statute of limitations when the adverse possession of the defendants and those under whom they claim began. 21 Jac., 1, ch. 16, sec. 2; Compiled Stat. D. C., p. 359. sec. 2.

It is unimportant to consider whether the statute, thus suspended, began to run from the date of the death of the wife or from that of her surviving husband, for the result would be the same in either event. Nor is it material to consider the disabilities under which the heirs of each married woman may have labored at the time of descent cast, as there can be no tacking of one to the other.

(2) The right derived through Tracenia Latimer was unquestionably barred, because more than ten of the requisite twenty years of uninterrupted adverse possession had elapsed after the death of both her and her surviving husband. Had she survived her husband she would not have had twenty years from the time of the removal of her disability, within which to bring her action, but the ten years only provided in the saving clause of the statute. The rule of construction of that clause is, that if more than ten of the twenty years' adverse possession required to ripen into title shall remain unexpired at the time the disability ceases, there shall be no extension of the time in favor of the party beyond the said twenty years; but if the whole period of twenty years, or more than ten years thereof, shall have expired, then the party shall have the full ten years from the date of disability removed within which to commence action and prevent the bar. Demorest *v.* Wynkoop, 3 Johns. Ch., 129; Smith *v.* Burtis, 9 Johns., 174; Jackson *v.* Johnston, 5 Cow., 74.

(3) Under the foregoing rule, the right of the plaintiff, Millard McCormick, derived by conveyance from Elizabeth McCormick and her husband, was not barred at the time the suit was begun. Counting the statute as commencing to run at her death, or that of her husband, or at the date of the conveyance aforesaid, the ten years saved to her had not expired.

But this condition could not avail him in the action as brought. Having joined with the plaintiffs representing the claim of Tracenia Latimer, his right falls with theirs.

The rule is old and well established, that if one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot. Morris *v.* Wheat, 8 App. D. C., 379, 385; Hard as this rule may seem to be, it was followed in that case in obedience to the decision of the Supreme Court of the United States in Marsteller *v.* McLean, 7 Cranch, 156, 159. In that case Mr. Justice Story said:

"It seems to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported;" and again: "When once the statute runs against one of two parties

entitled to a joint action, it operates as a bar to such joint action." See, also, Shipp *v.* Miller, 2 Wheat., 316, 324; Dickey *v.* Armstrong, 1 A. K. Marshall, 39, 40.

This was not only the settled rule then, but remained so for years in the majority of the States until changed by statutes regulating the practice in such cases. See cases cited in Morris *v.* Wheat, *supra*, p. 385; and in addition thereto Chandler *v.* Simmons, 97 Mass., 508; Kelley *v.* Meins, 135 Mass., 231, 235; Waterman *v.* Andrews, 14 R. I. 589, 599; May *v.* Slade, 24 Tex., 205, 207.

There has been no legislation affecting the rule of practice in the District of Columbia, and we do not consider it within our province to make a change therein.

29 The apparent hardship to this plaintiff might have been avoided by a separate suit on his own behalf.

The original rule at common law was that tenants in common could only sue separately because they were separately seized, and there was no privity of estate between them. Mobley *v.* Brunner, 59 Pa. St., 481; Corbin *v.* Cannon, 31 Miss., 570, 572; May *v.* Slade, 24 Tex., 205, 207; 4 Kent Com., 368.

The practice soon became general, however, in the United States to permit them to sue either jointly or severally as they might elect. 7 Enc. Pl. & Pr., 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession.

For the reasons given the judgment must be affirmed, with costs.

Affirmed.

30 TUESDAY, *January 4th, A. D.* 1898.

LUCY T. DAVIS, MILLARD P. MCCORMICK, and Virginia-Alabama Company, Appellants, *vs.* LOUIS COBLENS and MARTIN LAUER. } No. 694, January Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

January 4, 1898.

TUESDAY, *January 18th, A. D.* 1898.

LUCY T. DAVIS, MILLARD P. MCCORMICK, and VIRGINIA-Alabama Company, Appellants, *vs.* LOUIS COBLENS and MARTIN LAUER. } No. 694.

On motion of Mr. F. H. Mackey, attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of error

to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

31 Know all men by these presents that we, Lucy T. Davis, contracting in relation to her sole and separate estate, and Millard P. McCormick, as principals, and William F. Hellen, as surety, are held and firmly bound unto Louis Coblens and Martin Lauer, trustees, in the full and just sum of three hundred ($300) dollars, to be paid to the said Louis Coblens and Martin Lauer, trustees, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26 day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said Lucy T. Davis and Millard P. McCormick, together with The Virginia-Alabama Company, as appellants, and the said Louis Coblens and Martin Lauer, trustees, as appellees, a judgment was rendered against the said Lucy T. Davis, Millard P. McCormick, and The Virginia-Alabama Company, and the said Lucy T. Davis, Millard P. McCormick, and The Virginia-Alabama Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Louis Coblens and Martin Lauer, trustees, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within 30 day from the date thereof:

Now, the condition of the above obligation is such that if the said Lucy T. Davis, Millard P. McCormick, and The Virginia-Alabama Company shall prosecute said writ of error to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LUCY T. DAVIS. [SEAL.]
MILLARD P. McCORMICK. [SEAL.]
WILLIAM F. HELLEN. [SEAL.]

Sealed and delivered in the presence of—
As to Millard P. McCormick:
FRED McKEE.

Financial sufficiency of this bond is conceded.
J. J. DARLINGTON,
Att'y for Defendants.

Approved by—
R. H. ALVEY,
Chief Justice Ct. App'ls.

[Endorsed:] No. 694. Lucy T. Davis *et al. vs.* Louis Coblens *et al.* Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 31, 1898. Robert Willett, clerk.

32 UNITED STATES OF AMERICA, 88:

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company, appellants, and Louis Coblens and Martin Lauer, appellees, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

33 UNITED STATES OF AMERICA, 88:

To Louis Coblens and Martin Lauer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
J. J. DARLINGTON,
For Def'd'ts in Error.

34 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 33, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company, appellants, *vs.* Louis Coblens and Martin Lauer, No. 694, January term, 1898, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

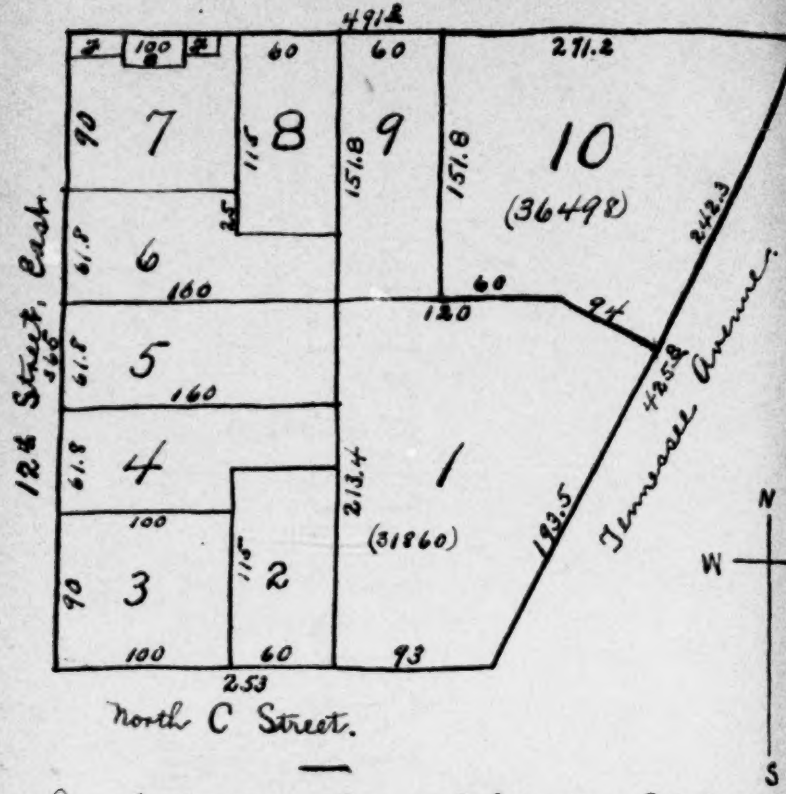
In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 31st day of January, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,805. District of Columbia Court of Appeals. Term No., 246. Lucy T. Davis, Millard P. McCormick, and Virginia-Alabama Company, plaintiffs in error, *vs.* Louis Coblens and Martin Lauer. Filed February 21st, 1898.

Plat of Square 1031

Showing original lot 10, the lot involved in this suit.



In the Supreme Court of the United States.

No. 246 October Term 1898.

Davis et al vs. Hoblens et al.

Exhibit to Brief for Plaintiffs in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 246.

LUCY T. DAVIS ET AL., PLAINTIFFS IN ERROR,

vs.

LOUIS COBLENS, TRUSTEE, ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

Plaintiffs in error brought this action of ejectment in the supreme court of the District of Columbia to recover $\frac{99}{100}$ undivided part of original lot ten (10), in square 1031, situate in the city of Washington, District of Columbia.

Plaintiffs and defendants both claimed from a common source of title, viz., Richard Young.

The plaintiffs claimed, and gave evidence tending to show, that he died, seized of said lot, July 30, 1860, leaving a last will, and that by the residuary clause thereof said lot passed to his widow, Matilda Young, for life, and on her death

October 7, 1874, to his children, (1) Lucy A. M. Bevans, (2) Tracenia Latimer, (3) Sophronia Magruder, (4) Elizabeth T. B. McCormick, and (5) Brook W. Young.

Of these children Lucy A. M. married John T. Bevans prior to the death of her father. She died in 1875, leaving her husband, who still survives her, and certain children and grandchildren whose names are set out in the record (R., 5).

Tracenia Young married Edwin Latimer in the lifetime of her father and died November 15, 1879, leaving her said husband surviving her, who died April 20, 1880. Tracenia left two children surviving her, the plaintiff Lucy T. Davis, who married Americus Davis prior to the death of her grandmother, the life tenant, Matilda Young. The other child is Charles M. N. Latimer.

Sophronia Young married Richard Y. Magruder before the death of said life tenant, Matilda Young, and died about the year 1880 or 1885, having survived her said husband and leaving two children, viz., Ella, who married Samuel Cox, in the lifetime of said Sophronia, and Richard Y. Magruder.

Elizabeth T. B. Young married Alexander McCormick in the lifetime of her father and died March 22, 1889, leaving her said husband surviving her, who died July 2, 1891.

Brook W. Young is still living.

Elizabeth T. B. McCormick, daughter of Richard Young, united with her husband in a deed, dated February 28, 1887, of all their interest in the lands of which Richard Young died seized, of which said lot was a part, to their son, Millard P. McCormick, who is one of the plaintiffs.

On the trial plaintiffs struck out as plaintiffs William W. Boarman and Charles M. N. Latimer. Evidence was given tending to show title in the remaining plaintiffs as follows:

Lucy T. Davis' title: On the 28th of February, 1887, she conveyed all her interest in the lands of which Richard Young died seized, of which lot ten was a part, to John H.

Walter. On the 25th of October, 1892, said Walter reconveyed to her all of said interest except that which he had in the interval conveyed to others, lot ten being one of the lots which he had not in said interval conveyed.

Millard P. McCormick's title: By deed from his mother and father above recited.

The Virginia-Alabama Company claimed by mesne conveyances from other heirs of said Richard Young.

The title claimed by the defendants was by adverse possession under a colorable execution deed from Tench Ringgold, the marshal of the District of Columbia, dated March 8, 1826, to Anthony Holmead, Jr., and by mesne conveyances from him to the defendants.

All the evidence being closed, the plaintiffs, then contending that the defendants had given no evidence *legally sufficient* to show an adverse possession of said lot 10 for the full uninterrupted period of twenty years, prayed the court to grant the following instructions, all of which were refused or modified as noted:

Instruction No. 1.

"The jury are instructed that the uncontradicted evidence in this case shows that Childs entered in the possession of the lot in controversy not earlier than the eight-day of March, 1875, and continued in such possession until about November, 1893, when he vacated said lot and square 1031, having about a year previously made a deed of said lot to the defendants in this case, and that there is no testimony in this case that said lot 10 was in continuous occupancy of any one from the period of such vacation by Childs down to the seventh day of March, 1895, and therefore the defendants in this case have not shown such an adverse possession of said lot 10 by themselves and said Childs, under whom they claim, for the full period of twenty years, and their verdict must therefore be for the plaintiffs."

Refused.

Instruction No. 2.

"The jury are instructed that the plaintiffs have proven a *prima facie* record title to the lot in controversy down to the time of filing of their suit; and they — further instructed that in order to divest the plaintiffs of their said record title to said lot 10 the defendants in this case must show a continuous possession by themselves and Childs of said lot 10 for the full period of twenty years from the eight-day of March, 1875, and that such possession must not only have been continuous, but it must have been actual, exclusive, open and notorious, and hostile to the plaintiffs in this case for said period of twenty years; that if at any time during said twenty years said lot 10 was not in the actual occupancy, as stated, of Childs or some one claiming under him, then the defendants have not established such an adverse possession of the property, and there is no evidence in this case tending to show an adverse occupancy or possession by the defendants or their tenants from the time Childs vacated said lot 10 down to the seventh day of March, 1895, as the law requires, and they must find for the plaintiffs."

Refused.

Instruction No. 3.

"The jury are instructed that the defendants in this case claim title with the plaintiffs from a common source, to wit, from Richard Young. The defendants are therefore not permitted to deny, nor can the jury find, that said Richard Young was not the owner of this lot 10 at the time of the marshal's deed to Holmead, and that the said deed of the marshal to Holmead is void and passed no title to Holmead or to any person claiming under him. As the defendants therefore claim under Richard Young, through said Holmead, their paper or record title is invalid, and the only title, if any, which they can show to this lot 10 is a title by adverse occupancy for the full and uninterrupted period of twenty years, as defined in instruction No. 2, and that there is no evidence in this case tending to show such adverse occupancy for said twenty years, and that their verdict must therefore be for the plaintiffs."

Refused.

Instruction No. 4.

"The jury are instructed that no adverse possession of lot 10 has been shown against any of the plaintiffs who claim under Tracenia Latimer and Elizabeth T. B. McCormick, and their verdict must therefore be for the plaintiffs, at least as to the interests which they claim under those persons."

Refused.

Instruction No. 5.

"The jury are instructed that they cannot find that the machinery was on any part of lot ten from the testimony of a witness who says, 'I don't know but what the rollers might have been on lot ten.'"

Refused.

Instruction No. 6.

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot ten, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis, and others, and the jury would not be justified in finding to the contrary."

"But the court refused to grant said instruction as prayed, but modified it by striking out the words 'and the jury would not be justified in finding to the contrary,' and by adding in lieu thereof the words 'and the weight to be given his testimony is a proper question for the jury.'"

The court then granted the following instructions at the instance of the defendants:

1.

"If the jury believe from the evidence that the defendants and those under whom they claim were in actual, exclusive, open, notorious, continuous, and hostile possession of the ground in controversy in this suit for twenty years before the institution of this suit, claiming it as their own, their verdict should be for the defendants."

2.

"Unless the jury shall find that each of the plaintiffs, under the plaintiffs' declaration as amended, is entitled to recover, their verdict should be for the defendants."

The granting of each of which was duly excepted to by the plaintiffs.

On the verdict, which was for the defendants, judgment was entered, and on a writ of error to the Court of Appeals of the District of Columbia the judgment was affirmed and the case is now here on a writ of error to the last-named court.

ASSIGNMENTS OF ERROR.

The court erred as follows:

1st. In permitting the defendant to cross-examine the witness Walter in the manner set forth on pages 9 to 14 of the record and to which the objections of the plaintiffs are there noted.

2d. In admitting in evidence the docket entries set forth on page 17 of the record.

3d. In refusing to grant plaintiffs instruction numbered one.

4th. In refusing to grant plaintiffs instruction numbered two.

5th. In refusing to grant plaintiffs instruction numbered three.

6th. In refusing to grant plaintiffs instruction numbered four.

7th. In refusing to grant plaintiffs instruction numbered five.

8th. In refusing to grant plaintiffs instruction numbered six as prayed; and

9th. In giving to the jury the said instruction numbered six, with the modification thereof made by the court.

10th. In giving to the jury the first instruction on behalf of the defendants and set out on page 22 of the record.

11th. In giving to the jury the second instruction on behalf of the defendants and set out on page 22 of the record.

ARGUMENT.

FIRST, EIGHTH, AND NINTH ASSIGNMENTS.

These assignments relate closely to each other, and with leave of the court we shall discuss them together.

For the purpose of showing title in the plaintiff Lucy T. Davis as to the share claimed by her, the title to an undivided interest in a number of lots, including lot 10 (the lot in controversy), was in the deraignment of title shown to be in one John H. Walter by a deed in fee executed to him by said Lucy T. Davis *et al.* (Rec., 6) on the 28th day of February, thereupon there was offered in evidence a subsequent deed in fee from said Walter to Lucy T. Davis and others (R., 6) reconveying "all those lands and tenements" which were conveyed by said Lucy T. Davis and others by said prior deed, which prior deed included lot 10. The deed from Walter, however, excepted from his deed of reconveyance "so much of all the lands and tenements above mentioned (being the land conveyed to him by the deed from said Lucy T. Davis *et al.*) as had been conveyed by the party of the first part (Walter) to *other persons* prior to the filing of a bill in equity cause 11637 (Cox *vs.* Walter) of the supreme court of the District of Columbia."

There were other exceptions in the deed, but they are of no relevancy to the questions now before the court.

Inasmuch as this deed of reconveyance from Walter to

Lucy T. Davis did not mention in terms any of the land conveyed, but simply described it as all the land conveyed to him by a former deed of his said grantee, Davis, *excepting* from his reconveyance such of said land as he had in the *interval* conveyed "to *other persons*," it became necessary in making out the plaintiff Lucy T. Davis' title to show that lot 10 which had passed by the prior deed of Lucy T. Davis *et al.* to Walter had not in the interval been conveyed "to other persons." It was not, of course, practicable to offer in evidence *all* the deeds ever made by Walter in the interval, and thus show that none of them conveyed lot 10. To establish, therefore, the negative fact that he had made no such conveyance he was called to the witness stand and he testified that this reconveyance was the *only* conveyance he had ever made of said lot 10. This was the *only* fact testified to by him and the only fact for which he was called to the stand (R., 8). On the cross-examination, however, the witness was conducted over an examination covering six pages (R., 9 to 14) of the printed record and covering innumerable subjects having not the slightest relevancy to the examination-in-chief. None of this examination was directed to impeach the veracity of the witness. It was for one purpose, and no other, viz., of getting into the jury box a prejudice of some sort against the witness by cunningly put questions charging the witness, without the slightest basis of fact (and it was immaterial, to affect his credibility, whether it was a fact or not), that he had been buying up "the interest in property from heirs of persons long since dead," said persons having no pretence of a connection with the heirs of Richard Young. It is plain that although the witness Walter was in no way interested in the suit brought by the present plaintiffs, yet it was sought thus unfairly to prejudice in some way the case of the plaintiffs by bringing the jury to believe that the title under which plaintiffs claimed was a title "bought up from the heirs of persons long since dead."

The admission of all of this evidence on cross-examination was excepted to, and the exceptions, as the record (R., 9 to 14) shows, were saved to the plaintiffs.

This ruling of the court in permitting this line of cross-examination constitutes the first assignment of error.

Of course this was diverting the jury from the real issue. The cross examination was not made in good faith, and it was, we respectfully submit, an *abuse* of the discretion which the law reposes in the trial judge to permit it to go on over the repeated objections of plaintiffs' counsel. Even the Court of Appeals said of this cross-examination:

"The complaint here made is that the cross-examination was chiefly [the court should have said 'solely'] for the purpose of showing that the witness was a dealer in speculative titles in order to prejudice the jury against him, and through him against the case of the plaintiffs. *If such was the purpose it would have been the duty of the court to refuse it, but while we are inclined to think that the cross-examination went too far,* we cannot say that there was an abuse of discretion in permitting it that would justify the reversal of the judgment."

Observe that the court says, "If such was the purpose." We submit in all candor that the vicious purpose of this cross-examination is as palpable as it could possibly be made without openly confessing it. The argument of counsel for defendants that it was designed to show, in spite of the positive assertion of the witness that he had *not* conveyed lot ten, that he might perchance be *mistaken* about it because he had made many conveyances of other lots in this city, is as thinly veiled a piece of sophistry as can well be imagined when we consider how easy it would have been for the defendants' counsel to have produced *the recorded deed*, if any such existed, and thus at once have stamped with falsity the witness' testimony. It is plain that defendants *knew* there was no such deed of record, else they would have produced it. It is no answer to say there might have been

a deed and not a recorded deed, for if it was not of record it was the same under our recording acts as to the defendants as if it had no existence. So we say that this cross-examination was palpably vicious in its purpose, and no one can say with *judicial certainty* that it did not prejudice the plaintiffs' case before the jury and lead them to reverse the rule of law that all facts in a case where the defense is of adverse possession must be clearly made out beyond a doubt—that is to say, that all doubts must be solved *against* the party who sets up such an affirmative defense.

We, of course, are aware of the general rule that allowance of questions upon cross-examination is a matter for the discretion of the trial court and is not generally the subject of review on writ of error, but there are well-settled exceptions to this rule, one of which is that if permitting the question worked, or might have worked, serious injury to the complaining party, it is error for which the judgment will be reversed:

"The rule has long been settled that the cross-examination of a witness must be limited to the matters stated in his direct examination. If the adverse party desires to cross-examine him as to other matters he must do so by calling the witness to the stand in the subsequent progress of the cause" (Houghton *vs.* Jones, 1 Wall., 702, 706, and see the Ottawa case, 3 Wall., 268; Phila., &c., *vs.* Stimson, 14 Pet., 448).

"In Wills *vs.* Russell, 100 U. S., at p. 626, it was said by this court that permitting a cross-examination of a witness to matters not called out on the direct examination is a matter for the discretion of the trial judge and is not a ground of error '*unless it appeared that it worked serious injury to the opposite party.*'

"The court must have the power to control the whole matter [of cross-examination] in the exercise of a sound discretion. *If that discretion be abused, correction of the abuse must be sought in the appellate court*" (Rice on Evidence, vol. 2, p. 598).

The effect of permitting such a cross-examination despite the repeated objections of counsel was bad enough, but it was made infinitely more so by the subsequent extraordinary ruling of the court in modifying, as it did, the plaintiffs' sixth instruction (see eighth and ninth assignments), to wit:

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10 in controversy in this case, to any person other than the conveyance by the deed to plaintiffs, Charles M. N. Latimer, Lucy T. Davis and others, and the jury would not be justified in finding to the contrary."

This instruction the court refused to grant as prayed, but insisted, over the objection of plaintiffs' counsel, upon striking out the perfectly proper words "and the jury would not be justified in finding to the contrary" and in their place inserting the words "*and the weight to be given his testimony is a proper question for the jury.*"

"It is error for the court to direct attention to a particular witness and instruct the jury as to their right to weigh his testimony."

Thomson on Trials, § 2421.
Dwyer *vs.* Bassett, 63 Tex., 277.
Crutchfield *vs.* Richmond R. R., 76 N. C., 320.

Consider for a moment the *effect* of these substituted words, taken with the previous conduct of the court in permitting a cross-examination which even the Court of Appeals felt impelled to say "went too far." Its thinly veiled purpose was palpable to the jury, and they were led to believe by the judge permitting it to be done over the plaintiffs' persistent objections that it was a *legitimate* purpose. With this in their minds, the evident *leaning* of the judge became law with the jury, and the nail was clinched in the coffin of the plaintiffs' case by his singling out the witness from all the other witnesses and telling them (the jury) that

the *weight* to be given that witness' testimony was a proper question for them to consider. Who had contradicted Walter? Who had said he was not truthful? Who had given the slightest scintilla of evidence tending in the remotest way to throw doubt upon his positive statement, repeated over and over again, that he *knew* he had not conveyed lot 10? No one. Not even an attempt was made to show the contrary. This attempt, therefore, of the court to throw an *atmosphere* of doubt upon his testimony by such an instruction, accompanied with the court's previous exhibition of a strong leaning (by permitting this cross-examination), would have been fatal to almost any case. Jurymen are neither lawyers nor logicians. In any case of doubt as to a fact the slightest token of the judge's leaning, even when he does not intend it to have that effect, sways their minds for or against a case, and we say emphatically, therefore, that the action of the trial court in these rulings as to Walter's testimony was practically (whatever its intention or lack of intention) a *suggestion* to the jury that it would be justified in disbelieving the testimony of the witness, although his credibility had not in the slightest manner been impeached. Can a court do this and obtain the sanction of an appellate tribunal jealous in its care of the functions of the jury? All the authorities say it is error. Observe that the plaintiff had offered at least *prima facie* evidence by the testimony of Walter that he had not conveyed lot 10, and until it was contradicted by *some* testimony tending to show the contrary it should have been considered *a proven* fact in the case. This court has said so on more than one occasion.

"*Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light; unless they are invested with authority to disregard the rules, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial if, under such circumstances, without

any rebutting evidence they disregard it. It would be error on their part which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes *conclusive* of the fact; that is, it should operate upon the minds of the jury as *decisive* to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject."

Story, J., in Kelly *vs.* Jackson, 6 Pet., 622.
United States *vs.* Wiggins, 14 Peters, 334.

"The proposition that the jury have the right to disbelieve such witnesses as, in their judgment, under all the circumstances of the case, are unworthy of belief is not law. The jury, although they are the judges of the credibility of witnesses, *have no right to arbitrarily disbelieve* the testimony, unless where the witness has wilfully and knowingly sworn falsely to material facts in the case."

Evans *vs.* George, 80 Ill., 51.

"The court, at the instance of the plaintiffs, instructed the jury, 'that they are the judges of the credibility of witnesses and of the weight of evidence. They may believe and accept or disbelieve any testimony which, under all the circumstances of the case, is not credible and entitled to weight in deciding the issue in this case.' This is entirely too comprehensive in its terms. The jury are at liberty to disbelieve the evidence of a witness who has been impeached in any of the modes recognized by the law for impeaching witnesses, which may include not only direct contradictions and evidence of bad character, but also the inherent improbabilities of his statements and his manner and appearance while testifying; but they cannot be allowed to go beyond this, and determine for themselves that other circumstances, not within legal contemplation, tending to impeach the witness, show that his evidence is impeached, and therefore entirely disregard it."

Hartford Life Ins. Co. *vs.* Gray, 80 Ill., 31.
And see Wickliffe *vs.* Lynch, 36 Ill., 210.

In Drew *vs.* Watertown Fire Ins. Co., 6 South Dakota, 335, defendants' counsel contended that "the jury had

the right to discredit the witness Patterson and his testimony concerning the sale of intoxicating liquors in the building covered by the policy. It was within the province of the jury to believe or disbelieve this testimony." The court, commenting on this proposition, said :

"This right conceded, would lack little of making the jury judicially omnipotent, for what the jury may rightfully do the court may not rightfully undo. While courts are, and ought to be, careful not to invade the province or abridge the right of the jury to determine questions of fact, yet the jury has little to do *where there was no question of fact in dispute upon the evidence, or upon the inferences which they are at liberty to deduce therefrom ;* but a jury is not at liberty to arbitrarily and without reason, reject or discredit the testimony of a witness. A jury is entitled to wide latitude in passing upon the credibility of witnesses, but its power is not unlimited. *The testimony of this witness was not all improbable in itself. The fact to which he testified was not disputed. It was of a character that if untrue it could easily have been disproved* [as in the case at bar where the record could easily have been produced had it existed]. He was not shown to have been in any manner interested. Under such circumstances there was nothing upon which the jury could reasonably base a rejection of his testimony."

SECOND ASSIGNMENT.

The court erred in admitting the docket entries. It was not in any way shown what connection *Anthony* Holmead, the judgment creditor mentioned in said entries, had with the case. The party secured by the trust from Richard Young to Bradley was *James B.* Holmead. It is therefore difficult to see what legal relevancy these docket entries had to the case. The trust to Bradley was to secure an indebtedness of $1,792 payable *on or before* November 2, 1820, whereas the judgment mentioned in said entries was obtained by Anthony Holmead long before that date, to wit, December 18, 1818, and therefore could not have been for that indebtedness, for, as the record (p. 16) shows, *it was not*

then (date of judgment) *due*, and, moreover, the amount of the judgment, $1,200, and the amount of the debt secured, $1,792, was entirely different. It also appears that while the judgment creditor was *Anthony* Holmead, yet the purchaser of the land under the execution sale was Anthony Holmead, *Junior*, and no attempt was made to show that these two Holmeads were identical, and the presumption is that they were not. The admission, therefore, of this evidence might well have prejudiced the plaintiffs' case with the jury by leading them to believe that Richard Young had in some way morally lost the right to his land by failing to pay this judgment, and that the defendants were morally entitled to claim a benefit from the fact that this judgment had been entered up against Richard Young and a levy made upon lot 10 and other lots in consequence, although at the time of said levy the legal seizin of the land was in Bradley, the trustee under the trust. It need hardly be argued that it is not proper to throw into the jury-box irrelevant evidence for no other purpose than to create *prejudice* against one of the parties and *sympathy* for the other. It is a vicious practice which should be condemned as it deserves, to say nothing of the error which the court commits in permitting it to be done.

THIRD, FOURTH, FIFTH, AND SEVENTH ASSIGNMENTS.

The refusal to grant instructions Nos. 1, 2, and 3 of the plaintiffs raises the question whether the defendants had offered any *legally sufficient* evidence of a continuous adverse possession of lot 10 from March 8, 1875, to March 8, 1895, for if they had not, the instruction plainly should have been granted. This therefore brings us to a consideration of the defendants' evidence, which we quote now in its entirety upon this question of adverse possession, putting in italics such portions as we deem important to be noted in making an analysis thereof:

"The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs & grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22nd day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase-money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October *without the consent of the defendants*, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'94, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the brick were removed when they left; that these brick were in process of removal along during the winter of 1893–'94, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine-house was located on the *north part of lot 1 in said square*, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to the jury, and that the rollers and machinery were north of

the machine-house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"'*I don't know but what the rollers might have been on lot 10.* The machine-house stood right in here (indicating), and *the rollers might have been on lot 10.*'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old brick were left on the ground, which the witness thought Childs & Sons *abandoned*, but they did not charge defendants for them, which were suitable for use in building, and were still there; *that defendants made no use of them*, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base-ball park, *but did not use it for that purpose;* that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool-boxes, and railroad iron on the square, though *none was attempted to be deposited on lot 10;* that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid, until June 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs and Sons left the square, which was in the winter of 1893–'4, perhaps along in November, December, January and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; *that said James D. Childs did not claim the land said bricks were on;* that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything un-

lawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, *though she made no use of it herself.*

"The defendants thereupon produced as a witness in their behalf Goff A. Hall, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

Analyzing the foregoing, we see that it tends to show that on the 8th of March, 1875, Isaac P. Childs took possession of the whole square 1031, in which lot 10 is situated, and that he continued with his grantees to hold and use said square as a brick yard "until January, 1892," when it was sold to the defendants under an agreement that Childs & Sons were to be allowed until February, 1893, to remove from the square, but in point of fact Childs & Sons continued in possession until October, 1893, *without the consent of the defendants.* During the period, therefore, from February, 1893, to October, 1893, the square was in the possession of parties *making no claim to it whatever*, nor were the defendants in occupation of it by Childs as their tenants. The statement in the record that they were "tenants holding over" is a statement of law not justified by the facts. They were not there as tenants, *but as trespassers*, claiming no right whatever in this land or pretending to be there by the permission of any one, and the record expressly states that they were there "without the consent of the defendants," who themselves had not yet taken possession. But, to proceed with the record, Childs & Sons "removed the *greater part* of their

effects from said square in the late fall or early winter of 1893–'94, but did not remove entirely until May, 1895" (R., 17, 18). It will be observed that the defendants did not show that *any part* of these effects (which were left after the greater part had been removed in the fall or early winter of 1893–'94) had been left *upon lot 10.* It is said that certain old bricks and machinery were left upon the *square,* but they might well have been upon the square and yet not have been upon lot 10. The jury could not be allowed to *presume* that they were left upon lot 10. Adverse possession is not made out in this way. Only one witness undertakes to even hint at a probability of any of the old machinery being left upon lot 10. He says, " I don't know but what the rollers *might have been* on lot 10 " (R., 18, seventh assignment), and surely that is not the clear and satisfactory evidence such as is required in proof of adverse possession. To leave the fact in admitted doubt is the same as failing to prove it. We had nothing to do with anything left upon other parts of the square. It was no trespass against us unless this machinery was left on lot 10, and left there, too, *as indicia of claim to the land.* In other words, " the flag must be flying " from lot 10, and not from other lots upon the square which we did not claim.

This is absolutely and positively the only testimony as to anything being upon lot 10 after Childs gave up possession of the square in October, 1893, and moved to another brick yard, except an old brick kiln of which we shall hereafter speak. The court was asked to tell the jury in instruction No. 5 (R., 21, seventh assignment of error) " that they could not find that any part of the machinery was on lot 10 from the testimony of a witness who says, ' I don't know but what the rollers *might have been* on lot 10;' " but the instruction was refused and the jury consequently were permitted to find from such testimony that the rollers were *perchance* on the lot in question until May, 1895. If this be sufficient

testimony to establish an adverse possession, then we have read the text-books and reports to no purpose.

"The doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by *inference*, but only by *clear* and *positive* proof" (1st Encly. of Law (2 ed.), p. 887, Title "Adverse possession," and see cases cited in note 2).

Again, the first attempt at occupancy made by the defendants was in November, 1893, when they put up some signs "For sale or rent," one of which was on lot 10, but how long is not shown (R., 18). It might have been taken off within the next ten days, for all that the record shows. Subject to whatever rights the defendants obtained by the erection of this sign on lot 10 for an unknown period, possibly for 24 hours, that lot (and in fact the whole square except that portion occupied by these rollers which, as we have seen, were not shown to have been left on lot 10) continued *entirely unoccupied and remained unoccupied* until "in the latter part of March or first part of April, 1894." Was this the continuous occupation such as the law of adverse possession requires? The old material left on the square was not shown to be on lot 10, and if it were there it is plain that the parties leaving it there set up no claim at that time to the lot. They had already sold to the defendants who had not yet taken possession, and the material was there *without their consent or agreement.* On or about the first of April the defendants rented the entire *square* to one John A. Downing, "who rented it for the purpose of converting it into a base-ball park, *but did not use it for that purpose.*" The only part of the square he claims to have occupied was lot 7. He says "the acts he did in reference to the occupation of the *vacant* ground" (that is, the rest of the square, including lot 10) were "that he prevented various parties from depositing tools, tool boxes, and railroad iron on the square, *though none was attempted to be deposited on lot*

10" (R., 18). It is plain from this witness' testimony that for the entire time during which he claims to have rented the *square* lot 10 was entirely *vacant* and an open common, and not a living soul was upon it in such manner that the plaintiffs could have sued them as trespassers. Downing continued to live in a house on lot 7, which he used as a dairy-lunch room until June, 1895, when he sold it (the lunch-room) to a Mrs. Schultz (R., 19), who continued in this lunch-house until the time of trial. She testifies that she "rented the house *with the privilege of using the entire square*, provided she neither placed nor permitted others to place anything *unlawful* upon it," and that she had stopped parties from dumping earth upon the square (it is not said of lot 10) and from driving across it, *though she made no use of it* (the square) herself (R., 19). The defendants seemed to think that proof of acts of authority over *any part* of the square would affect lot 10, but of course this is not the law. The plaintiffs claimed no part of the square, except lot 10. Until, therefore, lot 10 was interfered with in some open, notorious manner, under a claim of title to it, there was no adverse possession such as the law requires.

Here, then, is the testimony of defendants' own witnesses, showing conclusively that after "the latter part of March or first part of April, 1894," *no occupation of any sort* was had of lot 10, and yet to establish the defendants' case an open, notorious possession of it was necessary to have been shown down to March 8, 1895. We did not consider it necessary to encumber the case with an investigation as to how much longer lot 10 was vacant. For the purposes of the case the plaintiffs might well admit that there was complete occupation of lot 10 by the defendants during all the rest of the twenty years prior to April, 1894, but certainly no occupation of it was shown for one year *subsequent* to that period. That one year during which it was unoccupied was abundantly sufficient to break the continuity of the possession. The court should therefore have granted the first instruction.

He who comes into court defending his title upon the ground of adverse possession must make out his case for the full period. If for even *one day*, say the courts, it falls short of the statutory period, or there is a break in the possession that is enough to defeat his case. Even the Court of Appeals said the evidence "for the last two years was *somewhat meagre*."

The defendants claim, however, some sort of right from the fact that certain machinery and abandoned brick were left by Childs & Sons on the square, but Childs & Sons, it is conceded, left the square *long before* March, 1895 (to wit, "in the winter of 1893–'4, perhaps along in November, December, January, and February") (R., 19). If they left any old machinery or bricks it was not *under any claim to the land* that they left it, nor is it shown that these bricks were in March, 1895, on the square at all, to say nothing of lot ten.

The testimony as to these old bricks is on page 19 of the record and is as follows:

"After Isaac Childs & Sons left the square, which was in the winter of 1893–'4, *perhaps* along in November, December, January, and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away [when taken away is not stated]; that said James D. Childs *did not claim the land said bricks were on*."

Observe that in the winter of 1893–'4 these brick kilns were sold to a man who let them stay on the land for some uncertain period (it may have been only ten days), *but did not claim the land*, so that no benefit can arise from these brick kilns as an adverse possession. It is plain that James D. Childs only wanted the *bricks* of which these old kilns were made and sold them as soon as he could find a purchaser. The defense did not undertake to show when the bricks in the old kilns were taken away by those who bought them from James D. Childs, but who was not one of the grantors of the

defendants nor in any way in *privity* with them. If the bricks were there as a part of the *defendants'* adverse occupancy, it was their duty to show *how long* they remained on lot 10, and not only that, but that they were kept on the lot either by the defendants themselves or their tenants or some one under whom they claimed as an *insignia of claim to the land*, and it is perfectly clear that they did not claim under James D. Childs, nor was he in any manner their tenant. The jury would not be permitted to *presume* that these bricks were there until March, 1895 (over a year). But whether there or not, the defendants do not claim to have had any right in them or to *have given any permission for them to stay there*, or that they knew anything whatever about them. James D. Childs' possession of these old bricks was not a possession of the land, for he made no claim to that (R., 19), but even if he did there was not, as we have said, the slightest *privity* shown between his possession and the possession of the defendants. Suppose the plaintiffs, seeing these bricks upon their land and fearing that the person to whom they belonged had placed them there under some claim of title to the land, had gone to James D. Childs, to whom they belonged, and asked him whether he had them there under any claim to plaintiffs' land, he would have replied, "No, I make no claim to the land. I am only claiming the bricks." The plaintiffs could then have replied, "We do not object to the bricks being there as long as you are not claiming any title to our property." If it be said that the defendants gave him permission to keep them there, the reply is that the record shows nothing of the sort, and the jury could not be permitted to presume that the defendants knew they were there, and permitted them to be kept there with the *intent* to claim a benefit from their being on the land.

In adverse possession *intent* is everything. A party cannot claim that something left on the land without his knowledge gives him the right to claim that their being there is evidence of *his intent* to claim the land, and even if

by a third party with whom he is not in privity.

he could he must show *how long they were* there, and there is no pretense that that was shown.

We submit, therefore, that as to at least the last year the evidence was not only "somewhat meagre," as the Court of Appeals designates it, but that there was no *legally sufficient* evidence tending to prove an adverse occupancy of lot 10, and unless there was evidence tending to prove such an occupancy as was "open and notorious," such as would have attracted the attention of the plaintiffs and justified them in suing the occupants as trespassers, there was no adverse possession.

SIXTH ASSIGNMENT.

This has reference to the error of the court in refusing to grant the instruction numbered four, which was as follows:

"The jury are instructed that no adverse possession of lot 10 has been shown against any of the plaintiffs who claim under Tracenia Latimer and Elizabeth T. B. McCormick, and their verdict must therefore be for the plaintiffs at least as to the interests which they claim under those persons."

It was conceded by the court below, and we believe it is not controverted by the defense, that as to the McCormick interest the suit was brought within ten years after the conveyance by Elizabeth McCormick and husband to their son, Millard. The question raised by this instruction therefore is, Was the interest claimed under Tracenia Latimer barred?

She became entitled to a right of entry on the death of Matilda Young, the life tenant, October 7, 1874. A short time after this, March 8, 1875, the adverse possession of Childs began. Mrs. Latimer died November 15, 1879, four years and eight months and seven days afterwards. The husband, Edwin Latimer, survived her until April 20, 1880, when for the first time the daughter, Lucy T. Davis, became

possessed of the right of entry. She brought this action May 19, 1895.

This court has never decided this precise question before, viz., what effect the intervention of the life estate of the husband has in estimating the period during which the statute must run before the right of the heir can be barred. Isaac Childs, it will be observed, entered during the lifetime of Tracenia Latimer and was in possession four years eight months and seven days at the time of her death. But for the intervention of the husband's life estate Mrs. Davis would have had fifteen years four months and twenty-three days within which to bring her action. Through no fault or disability of coverture or otherwise on her part she was denied by the law the right of entry until her father's death—five months and five days. Is that period to be counted against her, or was the statute suspended during that period (as in the case of war) to take up again its running on the beginning of her right of entry? We know that a great deal has been said about disabilities not being allowed to be piled upon each other, but it is not a question of *disability* on the part of Mrs. Davis; she was perfectly competent to sue, for it was her statutory separate estate, but she had no right of entry until the death of her father, Edwin Latimer. Is the time which the law would have given her within which to bring her action to be shortened because of the intervention of a particular estate for nearly six months? Had it been because of a war which closed the courts to her, this court would say that it would not shorten the period, but that the operation of the statute was suspended during the time of the war's existence, and yet the courts were as effectually shut to Mrs. Davis during this period as if war had existed.

Hanger *vs.* Abbott, 6 Wall., 532, 541.
The Protector, 9 Wall., 687.
Levi *vs.* Stewart, 11 Wall., 244.

So, too, in the case of Montgomery *vs.* Hernandez, 12 Wheat., 129, it was held that the time which elapsed while certain prior proceedings were suspended by appeal should be deducted, as it appeared that the injured party in the meantime "had no right to demand his money or to sue for the recovery of the same."

Is not the intervention of a life estate a perfectly analogous case? We know, also, that it has been said that when the statute once begins to run it is not stopped by a subsequent disability to sue, yet, as we have seen, war has been made an exception to this rule; but in the case at bar the statute, *had not begun to run*, for there never was a time from the date of the entry by Isaac P. Childs, in 1875, until the death of Edwin Latimer, in 1880, that Mrs. Latimer or her heir, Mrs. Davis, could have brought ejectment, Mrs. Latimer because of her coverture and Mrs. Davis because of her right of entry being suspended during her father's lifetime.

"The statute does not begin to run until there is some one to sue or liable to be sued."

Wood on Limitations (1 ed.), sec. 6, note 2, and cases cited.

Now, if the law suspended the right of entry, why should it not also suspend the operation of the statute? This exact question was so ruled by the supreme court of Pennsylvania in the case of Marple *vs.* Myers, 12 Pa. St., 122, and we submit that reason and justice is on the side of that case, and if its doctrine be adopted by this court, then the Latimer interest was not barred, for the 15 years 4 months and 23 days left to Lucy T. Davis after her mother's death, had the curtesy estate not intervened, should be counted from the date of the death of Edwin Latimer, April 20, 1880, which would have given her until September 13, 1895, to bring the action. As she brought it May 19, 1895, she was in abundant time.

ELEVENTH ASSIGNMENT.

The court granted the following instruction at the instance of the defense, and the same was duly excepted to by the plaintiffs:

"Unless the jury shall find that each of the plaintiffs under the plaintiffs' declaration as amended is entitled to recover, their verdict should be for the defendants," (R., 23).

As we have seen, the record shows that the interests of Tracenia Latimer (the mother of the plaintiff Lucy T. Davis) and Elizabeth McCormick vested on the death of Richard Young, subject to the life estate of his widow, Matilda. Richard died July 30, 1860, and Matilda, October 7, 1874; consequently the Latimer and McCormick interests were not affected by the married woman's act of 1869 (R. S. D. C., secs. 727, *et seq.*). They were therefore within the disability clause of the statute of limitations (sec. 2, Abert's Compl. Stats. D. C., 359) when the adverse possession of the defendants and those under whom they claim commenced March 8, 1875, both of them being then under coverture. Whatever may be said of the Latimer interest, the McCormick interest, which was held by Elizabeth McCormick until she and her husband conveyed February 28, 1887, to Millard P. McCormick, was not barred by the statute, for Millard had at least ten years from the date of his mother's conveyance to him in which to sue, and this action was brought eight years, two and a half months afterward.

By this ruling, therefore, Millard P. McCormick's interest was lost to him because he had joined with other plaintiffs whom the court held to be barred by limitations.

This ruling was founded upon Morris *vs.* Wheat, 8 Appeals Cases, D. C., 379, in which the doctrine was first announced by the Court of Appeals that where two or more plaintiffs sue in ejectment, if one of them cannot recover,

none can. Is this good law in the District of Columbia? We submit that since the passage of the act abolishing fictions in the pleadings in ejectment, section 809, R. S. D. C., it is so no longer. At common law, as we all know, the action of ejectment abounded in fictions. The plaintiff, John Doe, was a fiction; the lease to him was a fiction; the casual ejector, who was the defendant, Richard Roe, was a fiction; but these fictions served the useful purpose of avoiding the cost and delay of trying the title to land by the old writ of right. Accordingly, if A, B, and C, being seized as joint tenants of land, were ousted therefrom by D, the method of proceeding to recover the land was to bring an action of ejectment in the name of John Doe, and in the declaration to allege that he, John Doe, held the land under a joint lease or *demise* from the fee-simple owners A, B, and C, and that being in possession of the land and in the enjoyment of his term, Richard Roe (the casual ejector) had ejected him therefrom. D, the *true ejector*, was then served with notice of the suit, and, upon his agreeing to confess the fictitious lease, entry, and ouster, was permitted to defend the action. On the trial the fictitious plaintiff, John Doe, must of course show title to the land in his joint lessors, A, B, and C. Now, if it appeared that only A and B were joint tenants in fee, then no recovery could be had because A, B, and C were shown to have no *joint* title to demise, and as it was their demise only which had been "confessed" under the rule, of course, as the whole allegation of a demise was a fiction, it was out of the power of the plaintiff to prove any other, and his action failed. Thus Seargent Runnington says, in his work on ejectment published in 1795, and a standard authority of that day of the common law:

"Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration (as by the ancient practice in most of the cases cited he was obliged to do), for that is *now* confessed by the rule, and by that means the mischief of any variance, between the lease

declared on and that produced and proved on the trial, is avoided; which was a danger the plaintiff was exposed to, and often miscarried in, by the old method of proceeding; yet in the modern practice the plaintiff must take care so to declare as suits with the real title to be sustained at the trial. So formerly, if there were several lessors, and the declaration was *quod demiserunt* the plaintiff was bound to show in them such a title that they might demise the whole; for the word *demiserunt* must be taken in pleading according to the legal sense it bears. So that if any of the lessors had not a legal interest in the whole premises, he could not in law be said to demise them, for it was only a confirmation, where he was not concerned in interest; and therefore the confession of the joint lease did not help, because he did not confess *the title*, by the rule."

Runnington on Ejectment, 221 (1st Am. E.).

Such was the common law as to joint tenants; but as to tenants in common a different rule prevailed. They were deemed not to be able to make a joint demise, but must demise their shares separately, and then the plaintiff declared on each demise in separate counts, when he could recover on one or more as he might prove himself entitled.

Runnington on Ejectment, 1 Am. ed., 222.

Tillinghast's Adams on Ejectment, 183, 187, 188.

Or the fictitious plaintiff, if it was preferred, might declare on separate demises; thus, the first count might be on a demise from A, B, and C, the second from A and B, the third from A and C, &c., and thus make out a title under at least one of the counts and recover on that count. This is shown in Adams on Ejectment, 189, where it is said:

"Where any doubt exists as to the party in whom the legal title is vested, it is usual to declare upon several distinct demises by the several persons concerned in interest and the claimants will not then be confined at the trial to one particular demise, but will be allowed to resort to any included in the declaration, under which they may be able to prove a title to the premises."

This was the case in Doe, dem. of Pool, *vs.* Errington, 1 Adolph and Ellis, 750, and in Doe, dem. Langdon, *vs.* Rowlston, 2 Taunt Rep., 441 (followed by Chief Justice Marshall in Doe, dem. Lewis *et al.*, *vs.* Barksdale, 2 Brock, 436–444), and in Fisher *vs.* Hughes, 2 Stra., 908, cited in Runnington on Ejectment, 213, and in the United States in Jackson, dem. Roman, *vs.* Sidney, 12 Johns., 185; Allen, etc., *vs.* Trimble, 4 Bibb's Rep., 21; Bevans, etc., *vs.* Taylor, etc., 7 Harr. and Johns., 1, and in Jackson, dem. Denberg, *vs.* Bradt, 2 Caines (N. Y.), 169. As will be seen, however, on reference to the cases decided in the United States, the strictness of the English rule was departed from by some of the State courts, at least so as to permit the plaintiff to allege a *joint* demise in two or more tenants in common and recover as the title might appear in one or more. (See especially Burrows' lessee *vs.* Nave, 2 Yerger (Tenn.), 227; Poole *vs.* Fleeger, 11 Pet., 185; Wheeler *vs.* Ladd, 40 Ark., 108; Jackson, dem. Roman, *vs.* Sidney, *supra*, and Jackson, dem. Denberg, *vs.* Bradt, *supra.*) In this last case there were two counts upon two demises, one a joint demise from three tenants in common and the other from one only. Kent, J., said:

"The last objection made by the defendant to the verdict was that no title corresponding with a joint demise by three of the lessors was shown. The title shown proves that the lessors of the plaintiffs are all tenants in common. *If this objection be well made the plaintiff is entitled to recover the proportion of the premises belonging to the lessor who demised separately.*"

So in Van Ness *et al. vs.* The Bank of the United States, 13 Pet., 17, 22, on writ of error to the circuit court for the District of Columbia. The action was ejectment. The declaration contained four demises purporting to have been made for the same premises by different lessors. The jury found for the plaintiff upon one of the demises, but said nothing of the other three, and the judgment of the court below was

entered in like manner upon the particular demise on which the jury found for the plaintiff, without taking any notice of the others.

Said Taney, C. J., speaking for the court:

"The verdict and judgment, it appears, are upon one of the demises only, and it is insisted that, as the jury did not find all of the issues committed to them by the pleading, the circuit court ought not to have entered a judgment for the plaintiff upon the issue found in his favor, but should have awarded a *venire de novo*, and that this irregularity in the proceedings may be taken advantage of upon a writ of error. It is not necessary to examine whether this objection could be maintained upon the practice and decisions of the English courts in relation to the action of ejectment. For the act of Congress of 1789, ch. 20, sec. 32, expressly provides, among other things, that no judgment shall be reversed for any defect or want of form, but that the courts shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regard to any imperfections, defects, or want of form in the judgment or course of proceeding, except those specially demurred to. *Now, the demises laid in a declaration in ejectment are known to be fictitious and mere form;* and if the appellant had taken this objection in the circuit court, in arrest of judgment, the plaintiff would undoubtedly have been permitted to strike these demises from the declaration and thus obviate the objection."

And in Allen *vs.* Trimble, 4 Bibb (Ky.), at p. 25, it was held that in ejectment where there was a demise for one moiety from one lessor, and for the other moiety from the other lessor, if the title of one of the lessors is not proved, yet the plaintiff shall recover according to the title proved by the other lessor. The court said:

"It is true cases have occurred where, owing to the variance between the proof and the allegations in the declaration, a recovery has not been allowed, even according to the title; as for example, when the declaration contained a joint demise by two, and the evidence proved a title in one only; then because the expression *demised*, in the plural,

indicated an interest in both the lessors, it was held the proof did not correspond with the title alleged, and the plaintiff could not consequently recover. But as the decision in the case just mentioned *grew out of the artificial import of a joint demise, and turned on the variance between the proof and the allegation in the declaration*, that case has no application to the case before us; for in the present case plaintiff has properly declared on separate demises; and although the jury might not be of opinion he had manifested a title in each of his lessors, there can be no substantial objection to his recovery according to the title which they should be of opinion he had proven."

In the very case of Morris *vs.* Wheat, which is cited by the appellees as the authority for this ruling of the Court of Appeals, the first step was taken by the supreme court of the District of Columbia to carry out the logic of the statute abolishing fictions in ejectment in the District, for when that case was before it on its first appeal, upon the question whether tenants in common might join in ejectment, Mr. Justice Cox, delivering the opinion of the court, considered fully the law with reference to the changes brought about by the statute, and held that while at common law tenants in common could not join in a single count in ejectment, yet, as they might do so in separate counts, our statute did away with the necessity for separate counts, and tenants in common might now join in one count and one action, since the fiction of the demise, which prevented them from doing so at common law, was now abolished. We quote the following from that decision:

"Now in a number of text books, it is true as a general proposition, as asserted, that tenants in common cannot join in ejectment; but when we come to examine the cases referred to they amount simply to this: that separate demises must be alleged of the separate undivided interests of the tenants in common. * * * Now, the next question is whether our statute has made any difference in this respect, sec. 809 [R. S. D. C.] says:

"'*All fictions in the pleadings in the action of ejectment within*

the District are abolished; and all actions for the recovery of real estate shall be commenced in the name of the real party in interest, and against the party claiming to own or be possessed thereof.'

"It is not to be conceived that Congress meant to *restrict* parties in asserting their interest, but on the contrary the law would be interpreted *in the other direction.* If any change was made it would undoubtedly be in the direction of extending the rights of parties. The object of that statute, however, seemed to be simply to strike out fictions in pleadings and *leave the parties with the same right of action in their own names that they formerly had in their fictitious form.* That seems to be the true interpretation of this statute."

Wheat *vs.* Morris, 21 Dist. of Col., p. 11.

It is submitted, therefore, that the corollary of this conclusion that tenants in common may join in one count in ejectment is that they may recover just as they could at common law when the fiction compelled them to declare in separate counts, since the reason for nonsuiting the fictitious plaintiff in ejectment where one of the joint lessors was without title no longer exists. In other words, the declaration is to be treated precisely as if there were a fictitious plaintiff suing upon *separate counts*, alleging a demise from each of the real plaintiffs (the lessors) and allowing him (the fictitious plaintiff) to recover upon the counts supported by the evidence. Were it otherwise, tenants in common in this District would be placed in a worse position by the statute abolishing fictions in the pleadings than they were before its enactment, for before the statute they could all have joined in one suit, laying separate demises in separate counts, and have recovered according to their manifest titles without danger of nonsuit of all if one or more should be shown to have no title. The only way to avoid that danger now, if the ruling of the Court of Appeals is to prevail, is for each tenant to bring a separate suit. Thus, if there be five tenants, five suits must be brought,

for it must be remembered that they cannot now sue in separate counts (one plaintiff in each count), as was practicable at common law when the real plaintiffs were merely the lessors, and the fictitious plaintiff declared on their demises each in a separate count. As Mr. Justice Cox said in Wheat *vs.* Morris, 21 D. C., *supra:*

"It is not to be considered that Congress meant to *restrict* parties in asserting their interests, but on the contrary the law would be interpreted in the other direction. If any change was made it would undoubtedly be in the direction of *extending* the right of parties."

We have examined the authorities cited in Morris *vs.* Wheat, 8 Appeal Cases D. C., 379, upon which the decision in the case at bar is founded, and we find them all to be either cases decided upon joint demises of joint tenants or cases not in point. Of the first were Dickey *vs.* Armstrong, 1 J. J. Marsh, 30, and Cheney *vs.* Cheney, 26 Vt., 606, which cite cases founded upon joint demises. The case in Blatchford was a *nisi prius* case, and no authority was cited. The cases in Illinois and in 7th Cranch were rested upon the doctrine that in actions *ex delicto* the misjoinder of too many plaintiffs is a ground of nonsuit. This rule, however, cannot be applied to the action of ejectment, for it is neither an action *ex delicto* nor *ex contractu.* Some have called it a mixed action, but it really partakes of neither; it is *sui generis.* At all events, we have seen that it was not because of the rule of misjoinder of plaintiffs (for there was never but *one* plaintiff, John Doe) that the action failed. It was because "John Doe" had alleged his title to be founded on a *joint* demise—for example, of A, B, and C—and in the proof it appeared that there was no such demise.

"The demise declared upon by the plaintiff, in the modern practice, is fictitious only; but still it must be consistent with the title of his lessor; that is to say, such a demise must be supposed to be made as would, if actually made, have transferred the right of possession to the lessee. Thus if

there be several lessors, and a joint demise by them all be alleged, such a title must be shown at the trial, as would enable each of them to demise the whole; because if any one of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them."

Adams on Ejectment, 186.

But, as we have seen under our statute abolishing fictions in the pleadings, there is no longer any joint demise to confound and confuse the parties. The action is now upon the *merits*, and the real parties in interest, when they show title, must be allowed to recover, just as they would have recovered at common law had the declaration alleged the fiction of separate demises in separate counts. To hold otherwise would be to apply a rule growing out of a fictitious state of facts to a case where the fictions are abolished and the real facts stated.

For these various errors which we have assigned the judgment should be reversed and the case remanded for a new trial.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 246.

LUCY T. DAVIS ET AL.

vs.

LOUIS COBLENS ET AL.

Brief of Plaintiffs in Error in Reply to Brief of Defendants in Error.

Plaintiffs in error deem it their duty to the court and themselves to point out, by way of reply, some of the errors of fact and of law contained in the brief of defendants in error.

I.

In the first place, on page 2 of their brief it is said:

"Some three-quarters of a century after these transactions [viz., the invalid execution sale] it occurred to one John H. Walter and Bartow L. Walker, *who appear to have been engaged extensively in speculation in old titles*," &c.

What is the purpose of this language, even if supported by the record, and emphatically it is not? We might ad-

mit that these two gentlemen were not only speculators in old titles, but in addition thereto were bank-robbers, highwaymen, and cut-throats, and yet that fact can have not the slightest relevancy to the case at bar. The question is, Have the defendants had twenty years' adverse possession of the plaintiffs' land and were the plaintiffs given a fair trial in the court below? That Messrs. Walter and Walker were speculators in old titles, even if such conduct were the foulest of crimes, can have nothing to do with the real issue. Why, then, was it made a subject of cross-examination before the jury (supposing it to be true) and again brought before this court if not for the one and only purpose of injecting into the minds of the jury and this Court the virus of prejudice against the witness. Do the learned counsel believe that this distinguished tribunal is not above being influenced in this way in the determination of causes, and therefore resort to such methods here? We submit that the very fact that the same reprehensible practice is resorted to in their brief in this court only strengthens our argument that the purpose of the cross-examination was vicious, and that in permitting it the trial court abused the discretion which is given it to allow a cross-examination to extend sometimes to matters not touched upon in the examination-in-chief. It is a species of contempt of court when the resort to such a practice is purely for the purpose of getting improper prejudices into the jury-box, and it is a submission to such contempt when the court permits it to be done.

II.

Defendants' counsel argue (p. 7 *et seq.* of their brief) that our eighth and ninth assignments of error, viz., the refusal of the court to grant our instruction No. 6, and, secondly, in giving it to the jury as modified by the court (Rec., 21), are not well taken, because (*a*) "No precedent, it is believed, exists for this requirement that a trial court shall select

particular items of the evidence testified to by a single witness * * * and shall (sic) instruct the jury that they are bound to believe his statement."

In the first place, the court was not asked by this instruction to tell the jury that they were "bound to believe his [Walter's] statement." The court was merely asked to say to the jury "that there was no testimony in this case tending to rebut the testimony of the witness Walter" upon the fact in question, "and that the jury would not be justified in finding to the contrary." The instruction was asked in view of the evident attempt, by the unfair and illegal cross-examination referred to, to throw discredit upon Mr. Walter's positive statement that he *knew* that he had not conveyed lot 10, a statement which, if false, could instantly and easily have been contradicted by producing the recorded deed from the office of the recorder of deeds. We were entitled to be protected by this instruction from any influence that this unfair cross-examination may have had upon the jury. But if it be true that the court ought not to select "particular items of the evidence testified to by a single witness * * * and instruct them that they are bound to believe his statement" (although that was not what we requested), what shall be said of the action of a trial court which, after refusing so to instruct, turns immediately round and, picking out this particular witness and referring to his testimony, tells the jury that "the weight to be given it" is a proper question for the jury? If the first was wrong, surely the second was doubly wrong. We did not ask the court to single out this witness and tell the jury that the *weight* to be given his testimony was a proper question for them, as if there were some doubts about the weight to be given it. If the court had told the jury that the weight to be given the testimony of *all* the witnesses was a proper question for them, we would not have objected, but it is throwing a *cloud*, so to speak, over a witness who has not been contradicted in the slightest degree when the court tells them that they

have a right to disbelieve him, notwithstanding no one has attempted to contradict him. It "savors" too much of an invitation to the jury to do so.

(*b.*) Again, the argument of defendants' counsel (p. 8 of their brief) that "the point becomes wholly immaterial in view of the verdict," because "only partial interest of any of the plaintiffs rested upon the deed from Walter," is wholly untenable. Who can say that the action of the court did not induce the jury to reject Walter's testimony *in toto*, and thereby (although they might have believed the defendants to have failed in showing a full twenty years' adverse possession) to find against *all* the plaintiffs because of their failure to prove that lot 10 had not been conveyed by Walter. It was the *sine qua non* of our case that Walter had not conveyed lot 10, and if the jury were led by this objectionable instruction, backed up by the reprehensible cross-examination, to find that he had, our case was lost, no matter though the jury believed the defendants had failed to prove adverse possession.

III.

Defendants' counsel claim (p. 9 of their brief) that the docket entries were properly admitted as "constituting in part the color of title under which the defendants claimed." Was it offered as such? Not at all. The record declares no reason for the offer; but if it had been, in what way could it have been tortured into a "part" of their color of title? Where was the other "part"? Not the marshal's deed, for that was sufficient of itself to constitute color of title. Moreover, the names in the marshal's deed and in the docket entries were not identical. Anthony Holmead, *Junior*, was the grantee under whom they claimed, as shown by the deed, while the docket entries showed a judgment in favor of Anthony Holmead. The deed recites the issuance of a

fi. fa. February 28, 1820, while the docket entries recite a *fi. fa.* issued in *June* term, 1820. The deed recites a levy and *sale* July 31, 1820, while the docket recites a *levy only*. Color of title has been defined to be "that which has the *appearance* of title, but which in reality is no title at all" (Wright *vs.* Mattison, 18 How., 50; Beaver *vs.* Taylor, 1 Wall., 637). If on its face it has not the "appearance" of title it is not color of title, as, for instance, a tax deed void upon its face (Redfield *vs.* Parks, 132 U. S., 239, and cases there cited). Now, where was any appearance of title in Anthony Holmead, Junior, shown by showing a judgment against a man not *identical* in name and which does not even show a *sale* of the lot claimed? Mr. Ridout, it is true, was called to eke out these "entries" by having him testify that lot 10 was levied on, "among other lots," under the *fi. fa.* issued "in said cause," but he does not, it is to be observed, testify that the record showed any *sale* of lot 10, nor, indeed, of any other lots under the said levy. Besides this, as we have shown in our principal brief, the other discrepancies in dates, amounts, &c., show it *on its face* not to be a judgment against Richard Young in favor of the identical person named as grantee in the marshal's deed.

But it is said that we stated no grounds for the objection to the admission of these docket entries, and therefore cannot complain of the court's action. It is submitted, however, that when it is apparent that a paper is not admissible *upon any ground whatever* it is not necessary to state the grounds of objection. It is only where there are apparently good grounds for admitting a paper until the *special* ground for its exclusion is pointed out that the rule relied upon by defendants' counsel applies.

IV.

From pages 10 and 11 of defendant's brief we quote:

"It is said that the bricks which remained on lot ten were simply left there by Childs, not sold by him to the defendants; *but this cannot alter the effect as to the notice* which they gave of adverse possession."

We submit that in making this statement of the effect of these bricks upon lot 10, sight is entirely lost of the *facts* of the case.

Isaac P. Childs & Bro. had sold lot 10 to the defendants Coblens & Lauer, and had left the lot. Coblens & Lauer had not taken possession and did not take possession for some time (about 3 years or so) afterwards. These bricks were on this lot for some time (how long does not appear) during the interval of Isaac P. Childs leaving and Coblens & Lauer taking possession. Consequently the bricks were not there as a sign, or notice, of adverse possession by *any one*, for Isaac P. Childs & Son were *then* making no claim to the land, and Coblens & Lauer, who did claim it, had not yet taken possession. The latter did not even know that the bricks were there. They had not authorized them to be put there or left there, and James D. Childs, the man who owned them (an entire stranger to Coblens & Lauer), distinctly says that although he allowed the bricks to stay there for an uncertain period, *he did not keep them there as a notice of any claim to the land.* Nor was any attempt made to show that either Isaac P. Childs & Son or Coblens & Lauer claimed (at the time in question) that they knew the bricks were there. How, then, could their mere presence upon the lot be notice that Coblens & Lauer were claiming our ground? If we had sued them in trespass for keeping these bricks there they could have defended successfully by showing that they had not authorized them to be placed there, and did not know of their being there, and

had no property interest in them whatever. Then, if we had hunted up James D. Childs, the man who, it is admitted, owned the bricks, he would have replied to us, "It is true my bricks are on lot 10, but I expect to take them away soon, and I don't claim that I own the land." To which we could well have replied, "Since they are not on our lot as a sign of adverse possession, we have no objection to letting them remain there." How in the world it can be claimed by any intelligent lawyer that the presence of these bricks under such circumstances upon our lot was notice to us *of Coblens & Lauer's claim* passes our comprehension.

V.

Again, defendant in error (p. 11) claims a benefit from the alleged payment of taxes, and cites the case of Ewing *vs.* Burnett, 11 Pet., 41, to the effect that payment of taxes, when accompanied by possession, is evidence of a *claim* of title, a sound doctrine in the law of adverse possession, and one which we are very far from disputing; but no court has ever said that payment of taxes, when unaccompanied by *possession*, can of itself consummate in the party paying them a title to the property. We all know the law to be that mere proof of possession without proof that the possession was accompanied by a *claim of title* does not constitute proof of adverse possession. It therefore becomes important, after a defendant in ejectment has proved possession by himself or those under whom he claims for the requisite period of time, to go further and show that he or they were at the time of the possession *claiming title* to the land. This is often difficult to prove in the case of deceased persons, except by showing that they paid the taxes during that period, and the courts very properly hold such payment to be evidence that the adverse occupant was for the time he paid them *claiming* the land. But if A occupies a piece of land for twenty years, except for an

interval of "even one day," say the courts, it is not a *continuous* possession, and though he had paid taxes during the entire period, he would not have acquired title by adverse possession. So in the case at bar. The defendants show a continuous possession by those under whom they claim for about seventeen years; then a long break of from at least six months to three years is shown. Of what avail is it to them that they were paying taxes during that period of three years, or even that they were publishing in the newspapers and from the housetops the fact that they were claiming the land, if they were not at the same time in *possession* of the land?

VI.

On pages 13 and 14 of defendants' brief it is said that—

"At the trial and in the Court of Appeals, as is shown by the opinion of the latter tribunal, the objection to the rejection of this fourth instruction was based solely upon the ground that Mrs. Davis was a *femme covert* at the death of her mother, Mrs. Latimer, and therefore entitled to the same protection as the latter against the operation of this statute. *In this court for the first time an additional point is raised,*" &c.

It is respectfully submitted that it was because the Court of Appeals and the trial court failed to notice all the points made in the argument of counsel (as courts have frequently done before and will do again—*humanum est errare*) that we are here endeavoring to get them recognized and passed upon. It would be a strange doctrine which held that because a court failed to consider all the points made by counsel to sustain his objection to an instruction to the jury, therefore the upper court must take the same course and consider only those which appear from the lower court's opinion to have been considered. Counsel for defendants

seems to fail to distinguish between the *objection* itself and the *argument* or points made to enforce the objection. Their contention, if upheld, would often compel the distinguished counsel who argued cases at this bar to confine themselves to the same argument made by their less experienced juniors in the court below. We do not desire, however, to be understood as saying that such is the fact in the case at bar. We only insist that all the objections raised in this court were raised in the court below. What the arguments were to sustain them in the court below of course cannot appear in the record, and the fact that the court in its opinion does not mention them is by no means evidence that they were not made.

VII.

The claim made by the defendants (p. 18 of their brief), even if it be true, that tenants in common must file separate suits—a point expressly decided to the contrary in Wheat *vs.* Morris, 21 Dist. of Col., 11—can have no bearing here, for the reason that the value of each one-fifth interest exceeds $5,000, as appears by the affidavit hereto annexed and several others which we have filed with the clerk, not considering it necessary to print more than one, since they are all to the same effect.

Respectfully submitted.

FRANKLIN H. MACKEY,
W. MOSBY WILLIAMS,
Attorneys for Appellants.

over

CITY OF WASHINGTON, *District of Columbia,* } ss:

Thomas G. Hensey, being duly sworn, deposes and says that he is the senior member of the firm of Thomas G. Hensey & Co., of the city of Washington, District of Columbia, real-estate agents and brokers; that he has been in the real-estate business in said city about fifteen years; that he is acquainted with the value of real estate in square 1031 and the vicinity, in said city of Washington, and that the fair market value of lot 10, in said square, is from 70 to 75 cents per square foot; that said lot contains, according to the official surveys, 36,498 square feet of ground.

THOS. G. HENSEY.

Subscribed and sworn to before me this 11th day of April, A. D. 1899.

MELVILLE D. HENSEY,

[SEAL.] *Notary Public, D. C.*

No. 246.

APR 10 1899

JAMES H. MCKENNEY,
Clerk.

Brief of Darlington for Defs in Error

IN THE

Supreme Court of the United States.

Filed April 10, 1899.

OCTOBER TERM, 1898.

LUCY T. DAVIS ET AL.,
vs.
LOUIS COBLENS ET AL.,
No. 246.

BRIEF FOR DEFENDANTS IN ERROR.

W. H. SHOLES,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

JUDD, LEE PRINTERS, 425 E STREET, N. W. WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LUCY T. DAVIS *et al.*
vs.
LOUIS COBLENS *et al.*
No. 246.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This was an ejectment suit, in which the defense was adverse possession. The cause is here upon appeal by the plaintiffs, principally because of the trial court's refusal to instruct the jury that there was no evidence of adverse possession for the statutory period of twenty years.

The ground in question—lot 10, square 1031—was allotted to Abraham Young, in the division between the United States Commissioners and the original proprietors, and, in partition proceedings between his heirs after his death, passed to his son, Richard Young, who was the common source of title. The lot was sold and conveyed under a judgment against Richard Young, in 1826, to Anthony Holmead, jr., and title thereafter passed regularly by a series of conveyances to the defendants. Prior

to the execution sale, however, namely, in 1818, Richard Young had conveyed the lot by deed of trust to William A. Bradley, trustee, to secure an indebtedness to James B. Holmead.

Some three quarters of a century after these transactions, it occurred to one John H. Walter and Bartow L. Walker, who appear to have been engaged extensively in speculation in old titles, that something could be made by raising the question of the invalidity of this execution sale, and of alleged irregularities of title affecting some fifty other lots formerly owned by Richard Young, although all the contemporaneous parties, who must have been familiar with the facts, had been entirely satisfied with the sale; and, accordingly, in conjunction with the plaintiff, Millard P. McCormick, who was a son of one of the heirs of Richard Young, deeds were obtained upon nominal consideration from the heirs who were *sui juris*, and by a proceeding in equity, which was before the Court of Appeals of the District of Columbia for review in Walter *vs.* Slater, 5 D. C. App. 357, it was attempted to vest title in trustees for the purpose of bringing suits, effecting compromises, and realizing generally whatever might be obtainable. Record, pp. 15-16. That court having held the equity suit a nullity, Walter's interest having passed to other parties through compromises or transactions among themselves, and Walker having vested his interests in the Virginia-Alabama Company, a corporation organized by him "to acquire, hold, own and dispose of real estate in fee simple and less estates, including equities and undivided interest therein," etc., the present action was instituted May 17, 1895, the plaintiffs claiming, nominally, a ninety-nine one-hundredths interest.

Some questions as to the operation of the statute of

limitations grew out of the following facts:

Richard Young died in 1860, devising his residuary estate, which included the ground in controversy if it belonged to him at all, to his wife Matilda for life, with remainder in fee to his children, Lucy A. M. Bevens, Tracenia Latimer, Sophronia Magruder, Elizabeth T. B. McCormick, and Brook W. Young. The life tenant, Matilda, died in October, 1874, leaving the four female remaindermen all *femes covert.* Under the amendment made by the plaintiffs after close of the testimony (Record, p. 20), only plaintiffs claiming under Elizabeth T. B. McCormick, and partial interests under Tracenia Latimer, Sophronia Magruder and Brook W. Young are left in the case

Tracenia Latimer died November 15, 1879, leaving a husband, who died April 20, 1880, and two children, one of whom, Charles M. N. Latimer, has been eliminated by the amendment, and the other of whom is Lucy T. Davis, who was married prior to the death of Matilda, the life tenant. Sophronia Magruder died "about the year 1880 or 1885," having survived her husband, and leaving two children, Ella, married to Samuel Cox in the life time of the said Sophronia, and Richard Y. Magruder, one-half of whose interests went to Walker, and, through him, to the Virginia-Alabama Land Company. Elizabeth T. B. McCormick was married prior to 1860, and died in 1889, having previously conveyed her interest in the property to the plaintiff, Millard P. McCormick.

On March 8, 1875, one Isaac P. Childs, grantee of the whole of square 1031, established a brick yard upon it, which occupied the entire square, the first structures erected by him being two brick kilns on lot 10. He and his grantees continued to hold and use it openly, notoriously, exclusively, continuously and in a manner hostile

to all the world until January, 1892, when he and his grantees sold and conveyed it to the defendants for $67,000, of which $30,000 was paid in cash, and $37,000, deferred purchase money, was secured upon the ground by a still existing deed of trust, upon which the defendants have ever since paid the interest. Childs and his grantees remained in possession, paying rent to the defendants, until October, 1893, and were tenants holding over for some time after the last-named date. The brick in the kilns on lot 10 were in process of removal during the winter of 1893–'94—the testimony of the plaintiffs in rebuttal fixing the time as about March or April, 1894. The defendants' testimony further tended to show that a part of the machinery was not removed until May, 1895; that the machine house was located on the north part of lot 1 (which is contiguous to the south part of lot 10), and that the machinery in question was north of the machine house, and probably on lot 10; that some of the brick were left on the ground; that these brick, though simply left there by Childs, were suitable for use in building, and are still there; that the foundations of the brick kilns are still standing; that, in the latter part of March or the first of April, 1894, the defendants rented the entire square to one Downing, who occupied and sublet a house located on lot 7, and prevented various parties from making any use of the square, and who remained as tenant in occupation of the square until June, 1895; that a Mrs. Schulz then rented the house, with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had prevented persons from dumping earth upon it or driving across it. In November, 1893, before Childs left it, the defendants had erected four signs, about four feet square, one at each corner of

the square, one of which was located on lot 10, to the effect that the entire square was for sale, or rent, on application to them. The defendants also proved the payment of taxes by them, and those under whom they claimed, from 1875, down to the time of the trial.

Assignments of Error.

Except the tenth, which seems not to be relied upon, or to require discussion (Holtzman vs. Douglass, 168 U. S., p. 285), the appellants' assignments of error, eleven in number, present seven legal propositions, namely .

I. That the court erred in permitting cross-examination of the witness Walter, tending to test his memory and probable accuracy of recollection as to a fact testified to by him.

II. That the court erred in admitting testimony tending to prove color of title on behalf of the defendants.

III. That the court erred in refusing to instruct the jury that there was no evidence of twenty years' adverse possession in favor of the defendants.

IV. That the court erred in refusing to instruct the jury that no adverse possession had been shown as against those of the plantiffs who claim under Tracenia Latimer and Elizabeth B. T. McCormick.

V. That the court erred in refusing to instruct the jury as to the effect of a segregated part of the testimony of one witness, upon one point in the case.

VI. That the court erred in refusing to instruct the jury to believe the testimony of the witness Walter, not affirmatively contradicted.

VII. That the court erred in instructing the jury that unless each of the plaintiffs was entitled to recover, the verdict should be for the defendants.

I.

The first of these assignments of error relates to the cross-examination permitted by the court of the witness John H. Walter.

The title asserted by the plaintiffs, Latimer, Davis and the Virginia-Alabama Land Company, depended in part upon a deed from John H. Walter, which expressly excepted the lands which had been conveyed by said Walter to other persons prior to its execution. It therefore became incumbent upon the plaintiffs to show that lot 10, in square 1031, did not fall within this exception.

Maxwell Land Grant Co. *vs.* Dawson, 151 U. S. 586.
Reeves *vs.* Low, 8 D. C. App. 105.
Hammond *vs.* Inloes, 4 Md. 175.
Jay *vs.* Michael, 82 Md. 1–12.

To meet this requirement of their case, instead of introducing testimony as to the state of the land records upon this question, or at least having their witness Walter review his numerous and complicated conveyances in transactions of this charcter and testify from some examantion of them in regard to lot 10, they chose to rest this part of their case upon his off-hand recollection that he had not conveyed it, admitting that he had made no such review of them, and was unable to state how many conveyances he had made respecting the fifty or more lots which came to him through these same deeds from the Young heirs, on which the claim of title through him to the lot in controversy rested. Record, p. 10. He at first testified (Record p. 8), and repeated it against the warning objec-

tion of plaintiffs' counsel (p. 10), that he had never made any deed affecting lot 10, except the one under which the plaintiffs were claiming, although the deeds offered in evidence by them showed a prior deed by him to his associate Walker for a half interest in all the lots he had obtained through deeds from the Young heirs, lot 10 included ; which inaccuracy he could only explain, after it was pointed out to him, by claiming to have understood the question to refer to a matter which had not been mentioned throughout his examination, by either side.

The present objection is that, under the circumstances, the court permitted the defendants, on cross-examination, to interrogate the witness as to the very large number of deeds, some two hundred or more, which had been made to and by him, many of them including fifty or more squares or parts of squares in a single conveyance, and to show that he had not reviewed these numerous conveyances recently or taken any steps to verify his statement or impression that lot 10 had not been included in any of them.

That this latitude of cross-examination was not only within the discretion of the trial justice but that, under the circumstances it was absolutely the right of the defendants, is respectfully submitted. The circumstance that such cross-examination brought to light some facts which the plaintiffs' counsel conceived to be prejudicial to the witness and to certain of the plaintiffs who were associated with him in his transactions, could not deprive the defendants of that right.

II.

A second assignment of error, considered here because of its connection with the preceding, is to the court's refusal to instruct the jury that they were bound to believe

the testimony of Walker upon this point, from the fact that it had not been negatived by testimony in contradiction on the part of the defendants.

No precedent, it is believed, exists for the requirement that a trial court shall select particular items of the evidence, testified to by a single witness, when better evidence was available, and shaken by the evident absence of any attempt or effort upon the part of the witness to be accurate about it, and shall instruct the jury that they are bound to believe his statement. Enough appears in the Record to show that, on a material point where much was involved, the testimony of Walter was anything but satisfactory, and that not the slightest attempt had been made to refresh his memory or secure accuracy. In addition, his bearing upon the stand, his manner of testifying, his appearance, his evident candor or the want of it, and the like, were all entitled to be considered by the jury as well as by the trial court, and may well have justified the former in discrediting him, or the latter in being unwilling to interfere with their conclusions as to the weight to be given to his testimony.

The point becomes wholly immaterial, anyhow, in view of the verdict. Only partial interests of any of the plaintiffs rested upon the deed from Walter containing the exception in question; the verdict was against the plaintiffs, as to all the interest claimed by them, and, therefore, could not have been at all affected by that deed, or the exceptions contained in it. That judgment will not be reversed, even for error, if the appellant was not injured thereby, is a familiar rule.

Gilbert *vs.* Moline Plough Co., 119 U. S. 491.
Glenn *vs.* Sumner, 132 U. S. 152, 157.
W. & G. RR. Co. *vs.* McLane, 25 Wash. Law Rep., p. 486.

III.

The third assignment of error is to the admission by the court of the docket entries of the late circuit court, loss of the original papers having been first proved, to show recovery of the judgment against Richard Young, and levy upon lot 10 thereunder, constituting in part the color of title under which the defendants claimed. The action of the court in the admission of this evidence, it is submitted, was entirely correct, and, if it had not been so, the mere objection of the plaintiffs, unaccompanied by the statement of any grounds of objection is insufficient, under repeated decisions of this and other courts.

Washington Gas Light Co. *vs.* Poore, 3 App. D. C. 134–135, and citations.

Patrick *vs.* Graham, 132 U. S. 627.

IV.

The fourth alleged ground of error, covering the third, fourth, and fifth assignments of error as enumerated by plaintiffs, consisted in the court's refusal to instruct the jury, as prayed in the first three instructions offered by them, that there was no evidence from which they could find twenty years' adverse possession by the defendants and those under whom they claimed.

From March 8, 1875, to January, 1892, Childs and his grantees occupied, as owners, the whole square as a brickyard. From January, 1892, to October, 1893, they continued in such actual occupation as tenants of the defendants, their grantees, paying rent therefor. After October, 1893, they were tenants holding over, not disputing the defendants' title, as they could not do, being their tenants, and not completing the removal of the kilns, in so far as these were removed, according to the plaintiffs' own testimony, until March or April, 1894.

The machine-house, located before the jury on a plat, not reproduced in the record, stood at the northern extremity of lot one, and, north of it lay, until May 1895, large rollers and other machinery which it required two four-horse wagons to remove. Some of the brick, which were such as are used in building, remained on the ground, as did the foundations of the kilns, down to the time of the trial—a use than which it is not easy to conceive one more sharply distinctive and adverse. Holtzman *vs.* Douglas, 5 App. D. C., 397–410; S. C. 168 U. S. 278.

In the latter part of March or the first part of April, 1894, the defendants had rented the entire square to the witness Downing, who remained in possession until after this suit was instituted, living on lot seven, claiming and asserting his rights as tenant of the defendants over the entire square, and preventing third parties from using it, or any part of it; and, in addition, the defendants had then posted the entire square, lot ten specifically included, with signs, each four feet square, to the effect that the entire square was for sale or rent on application to themselves, these signs having been erected in November, 1893.

To this is to be added the fact that no payment of taxes, and no exercise of any right of ownership over the property, by the plaintiffs or those under whom they claim was attempted to be shown since 1826, when the property was sold at the execution sale to Anthony Holmead, under whom the defendants claim; and, as the record shows, the taxes had been paid by the defendant and those under whom they claim from 1875 down to the time of the trial.

It is true that the brick which remained on lot ten were simply left there by Childs, not sold by him to the defendants; but this cannot alter the effect as to the

notice which they gave of adverse possession. They were upon the ground, and gave the same notice to the plaintiffs and the world at large that they were there by authority of persons claiming the right to use the ground for that purpose as if the defendants had bought them of Childs and Son; and, in connection with this notice, the payment of taxes "was powerful evidence of a claim of right to the whole lot."

Had Childs and Son left there a fence, or an entire brick kiln, or any number of them, which the defendants had not purchased but permitted to remain there, the legal effect as notice would have been the same.

To contend that, upon these proofs, there was no evidence to go to the jury of adverse possession is to ignore the law of adverse possession as laid down by this court, by the courts of the District of Columbia and by all the authorities.

> "It is well-settled law that, for the purpose of a title by adverse possession, actual inclosure is not necessary, and that any occupation of the property, visible and notorious, of which the property is susceptible, and which excludes the true owner from it, is sufficient."

Holtzman *vs.* Douglass, *supra*; citing Ellicott *vs.* Pearl, 10 Pet. 412: Ewing *vs.* Burnett, 11 Pet. 41.

> "Nor should the fact be ignored, in this connection, that for upwards of twenty years the record-owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendants to discharge the burden which it was incumbent upon themselves to bear, and it might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired.

> In the case of Ewing *vs.* Burnett, 11 Pet. 41,54, the Supreme Court of the United States said that 'the uninterrupted payment of taxes on the lot for twenty-four successive years (by the party in possession) was *powerful* evidence of a claim of right to the whole lot.' And we are disposed to hold, in accordance with that view, that there was ample evidence in this case to go to the jury to show the claim of the defendants and the nature and extent of it from the year 1867."

Holtzman *vs.* Douglass, *supra.*

See also—

Miller et al. *vs.* Shaw, 7 S. & R. 136.
Farrar *vs.* Fessenden, 39 N. H. 277.
Watkins *vs.* Holman et al., 16 Pet. 54.
Coleman *vs.* Billings, 89 Ill. 189.
Booth *vs.* Small, 25 Iowa, 178–181.
Clement *vs.* Perry, 34 Iowa, 567.
West *vs.* Lanier, 9 Hump, 762.

The evidences of adverse possession were more numerous, and, to say the least of them, in no respect less strong, in the case at bar than in Holtzman *vs.* Douglass. Indeed, the two cases are in all material respects quite similar.

V.

The fifth ground of exception, embracing the plaintiff's sixth assignment of error and the rejection of their fourth prayer for instructions, is the court's refusal to instruct that no adverse possession had been shown as against the plaintiffs claiming under Tracenia Latimer and Elizabeth T. B. McCormick.

The basis of this exception lies in the fact that, when the adverse possession began, Mrs. Latimer was a married

woman, and that, at her death, her daughter, the plaintiff Lucy T. Davis, was also under coverture. The death of Mrs. Latimer occurred in 1879, and that of her husband in 1880; so that the ten years allowed persons under disability within which to bring suit expired long before the institution of this action, unless the disability of Mrs. Davis can be tacked to that of her mother, Mrs. Latimer. The statute, 21 James 1, Ch. 16, requires actions like the present to be brought within twenty years after they accrue, except that, in case of infancy, coverture and the like, the disabled person, or his heirs, may sue within ten years after the termination of the disability.

The heir, however, has ten years after the disability is removed, only in case the unexpired portion of the original twenty years does not exceed that time. Where, as in the present instance, fifteen years of the original twenty remained after termination of the disability, the heir has no additional time.

Ang. Lim., §481, and App. IV.

Unless, therefore, Mrs. Davis can claim exemption from the provisions of the statute because the termination of her mother's coverture found her laboring under the same disability—if, since the Married Women's Act, it be a disability—then the plaintiffs' fourth instruction was properly refused.

The precise point was decided by the Supreme Court of the United States in Mercer *vs.* Selden, 1 How. 52–3, 55, the decision of the court in which case removes the question from the field of discussion.

At the trial court, and in the Court of Appeals, as is shown by the opinion of the latter tribunal, the objection to the rejection of this fourth instruction was based solely upon the ground that Mrs. Davis was a *feme covert* at the

death of her mother, Mrs. Latimer, and therefore entitled to the same protection as the latter against the operation of the statute. In this court, for the first time, an additional point is raised, namely, that the death of Mrs. Latimer in the life-time of her husband presents some analogy to cases in which the late Civil War was held to have suspended the operation of this statute, notwithstanding the fact that Mrs. Davis, their daughter, allowed fifteen years instead of ten to elapse after the death of the survivor of them before instituting her suit.

The claim now presented on her behalf seems to be that, although the statute of limitations began to run against her mother, through whom she claims, certainly as early as March, 1875; and though no coverture, infancy, insanity or other disability of any kind could thereafter stop it, it was nevertheless arrested by the fact that, upon the death of the mother, the title descended to one in privity of law with herself, in such sense that she should have more than the ten years provided by the statute within which to bring her action after all obstacles were removed.

The sole authority cited, Marple *vs.* Myers, 12 Pa. St., 123, was a case in which the action was brought within much less than ten years after removal of the disability. The tenant by courtesy conveyed his interest to the plaintiffs, the heirs of his deceased wife, in 1845, and the case was heard and decided in the Supreme Court in 1849, only about four years later.

The latter court, it is true, referring in its opinion to the mother and aunt of the plaintiffs, both of whom were under coverture throughout the period of adverse possession, said: "The operation of the statute being thus suspended until their deaths, their estates were up to that period as unaffected by it as though no hostile possession existed."

This, however, must have been addressed to a statute differing materially in its provisions from that of 21 Jac. I, Ch. 16, Sec. 2, in force here, or must not have been intended to be taken as broadly as the language use is capable of being construed. The court could not have meant that these *femes covert*, the statute once having begun to run, could have maintained an action at a later period than twenty years from its commencement, or ten years from removal of their disability; or, if so, its language must be taken as the expression of an opinion upon a point not presented by the case before it. Certainly, no reason can be urged in favor of the application of such a principle to cases like the present, and the entire policy of the statute, and public policy as well, are opposed by it.*

VI.

A sixth ground of exception, embracing the plaintiffs' seventh assignment of error and the rejection of their fifth prayer for instructions, may be briefly disposed of. A witness, having shown that the machine-house was erected on the north part of lot one, which adjoins the south part of lot ten, and that two rollers and a quantity of smaller machinery were scattered over the ground north of this machine-house, added "I don't know but that the *rollers* might have been on lot ten;" whereupon the court was asked to instruct the jury that, because of the quoted expression of the witness, they must find that no part of the machinery was on lot ten.

If it had been the duty of the court to pass upon segregated portions of the testimony, which all the authorities deny, still the plaintiffs would not have been entitled to the instruction, couched in the terms in which it was presented.

*Further reference upon this point is respectfully made to the following authorities:
McDonald v. Hovey, 110 U.S., 621-2.
Gibson v. Ruff, 8 D.C. App., 262 and citations
Angell on Lim., Sec 478.
21 Jac. 1, ch. 16, Secs. 1 and 2.

The court did instruct the jury to find twenty years actual, exclusive, open, notorious, continuous and hostile possession of the ground in controversy as a prerequisite to a verdict for the defendants, and instructed them that no possession of any portion of square 1031 was an adverse possession against the plaintiffs unless such possession was actually extended to lot ten for the full, uninterrupted period of twenty years prior to the institution of the suit. This instruction stated the law as fully and as strongly in favor of the plaintiffs as they were entitled to and, it is believed, considerably more so.

VII.

The final ground of exception is the granting of the defendant's prayer, at page 22 of the Record, that, unless each of the plaintiffs was entitled to recover, no one of them could do so.

This instruction was granted by the trial court upon the twofold ground, first, that it had always been the rule in actions of ejectment, and, secondly, upon the broader ground that in all actions, whether *ex contractu* or *ex delicto*, too many parties plaintiff are fatal, at any stage of the cause, to recovery on behalf of any.

The first of these grounds being sustained by the Court of Appeals in its opinion, Record, pages 29–30, the question is there rested upon it alone. Its reasoning is attacked on behalf of the appellants upon the claim that the rule in question was applicable only to the action of ejectment based upon the fictions upon which that action formerly rested; and that it is without application where fictions are abolished, and the plaintiffs sue, not upon a joint demise, or as joint tenants, but as tenants in com-

mon. No authorities for this is cited, and none, it is believed, can be found.

In Chandler et al. *vs.* Simons, 97 Mass. 508, 515, the plaintiffs were tenants in common, one of whom was entitled to recover and the other was not. It was held that the statutes of 1785 and 1828, permitting co-heirs, joint tenants and tenants in common either to sever or to join in real actions, did not alter the rule that, if the right of any joint demandant to recover proves defective, the action must fail, unless the writ is amended by striking out such party before verdict. See, also, Poole *vs.* Robinson, 10 Mass. 179; Kelley *vs.* Meins, 135 Mass. 235.

So, in Waterman *vs.* Andrews, 14 R. I., 589, cited by the Court of Appeals, if several plaintiffs join in ejectment, all must be entitled to possession; otherwise, by general rule, judgment must be given for the defendant.

If any one of the plaintiffs has no title to the land in question, though the other plaintiffs may have the whole title, no recovery can be had in this action. To entitle the plaintiffs to a verdict, all the plaintiffs must have the right to demand the possession."

DeMill *vs.* Lockwood, 3 Blatch. C. C., 61.

This is but an application to the action of ejectment of the broad and general rule, namely, that in all actions, whether *ex contractu* or *ex delicto*, too many plaintiffs are fatal.

In Marsteller *et al. vs.* McLean, 7 Cranch, 156, which was an action for mesne profits after a recovery in ejectment by the plaintiffs against the defendants, and therefore, the nearest possible analogy to an action of ejectment with fictions eliminated, this court held it to be a settled rule that "all the plaintiffs in a suit must be

competent to sue, otherwise the action cannot be supported."

So, in May *vs.* Slade, 49 Tex., 205, it is declared that, if one who has a good cause of action join in trespass *quare clausum fregit* with one who has no cause of action, the suit cannot be sustained, citing Murray *vs.* Webster, 5th N. H., 391.

The escape from this rule, universally prevailing in all actions, both *ex contractu* and *ex delicto*, seems to be sought, not in denying or attacking the rule, but in claiming that the action of ejectment is unclassified, and is neither *ex contractu* nor *ex delicto*.

Inasmuch as the action of ejectment is, in its original, a trespass, it is difficult to see how the abolition of fictions takes it out of the category of actions for tort; or why, or how, even if it were thus converted into a third and hitherto unknown class, as claimed, it has been exempted from a rule universally applicable to all forms of procedure hitherto known to the law.

The argument of the learned counsel for the appellants, however, that the admission of tenants in common to sue together in ejectment leaves them the representatives of separate and distinct interests, has an important bearing upon the question of the jurisdiction of this court in cases of this character. But for such admission, each tenant in common must have filed a separate suit, and could have had no appeal to this court, unless his separate interest involved the requisite pecuniary value. Was it the object, or the effect, of this admission to permit them to gain, by uniting their separate interests in one suit, an appeal to which no one of them is entitled?

Distinct judgments in favor of, or against, distinct parties, though in the same record, cannot be joined to give this court jurisdiction.

Tupper et al. *vs.* Wise, 110 U. S. 398.

And the burden is upon the plaintiff in error to show the jurisdiction.

Johnson et al. *vs.* Wilkins, 116 U. S. 392.

It is respectfully submitted that the judgment of the court below should be affirmed.

W. H. SHOLES,
J. J. DARLINGTON,
Attorneys for Defendants in Error.

DAVIS *v.* COBLENS.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 246. Argued April 18, 19, 1899. — Decided May 22, 1899.

In this action of ejectment, the evidence of adverse possession contained in the bill of exceptions, and set forth in the opinion of this court, is sufficient to justify the action of the trial court in submitting the question to the jury.

By the terms of the statute in force in the District of Columbia, the time of limitation of this action commenced to run against Lucy T. Davis, one of the plaintiffs in error, on the death of her mother, and as her mother's death took place more than ten years after the cause of action accrued, the term against the plaintiff in error expired in ten years after it accrued, and no disability on her part arrested its running.

It is the general practice to permit tenants in common to sue jointly or separately in ejectment; but if they sue jointly it is with the risk of the failure of all, if one of them fail to make out a title or right to possession.

When a cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error.

The plaintiff requested the following instruction: "The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10, in controversy in this case, to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis *and others, and the jury would not be justified in finding to the contrary.*" The court struck out the words in italics, and inserted instead, "and the weight to be given his testimony is a proper question for the jury." *Held* that this was not error.

THE statement of the case will be found in the opinion of the court.

Mr. Franklin H. Mackey for plaintiffs in error. *Mr. W. Mosby Williams* was on his brief.

Mr. J. J. Darlington for defendants in error. *Mr. W. H. Sholes* was on his brief.

Mr. Justice McKenna delivered the opinion of the court.

This is an action of ejectment brought by the plaintiffs in error and one Charles M. N. Latimer against the defendants in error for ninety-nine one-hundredths ($\frac{99}{100}$) undivided part of original lot ten (10), in square 1031, in the city of Washington, D. C.

The declaration was in the usual form, and defendants pleaded not guilty, on which issue was joined.

The plaintiffs derive title from Richard Young as heirs at law or grantees of heirs at law. The defendants claim by adverse possession under claim of title under an execution sale upon a judgment recovered against said Richard Young some time in the year 1826.

The case was tried by a jury. Before the case was submitted leave was granted to amend the declaration by striking out plaintiffs Charles M. N. Latimer and William W. Boarman. The verdict was for defendants. And after a motion for new trial was made and denied, judgment was entered in accordance therewith. The plaintiffs appealed to the Court of Appeals, where the judgment was affirmed, and the case was brought here.

There are eleven assignments of error in plaintiffs' brief. All but three relate to instructions given or refused or modified concerning adverse possession. The plaintiffs contended for or objected to instructions which submitted the question of adverse possession to the jury. The other assignments of error will be noted hereafter.

1. The evidence of adverse possession contained in the bill of exceptions is as follows:

"The defendants thereupon further offered evidence tending to prove that on March 8, 1875, Isaac P. Childs, and

grantee of the whole of square 1031 under a deed from Alexander R. Shepherd, bearing date the 22d day of February, 1875, the same being one of the chain of conveyances offered in evidence by the plaintiffs as tending to show a common source of title, took possession of the whole of said square, converted it into a brick yard, and continued to hold and use it as such, openly, notoriously, exclusively, continuously, and in a manner hostile to all the world, until January, 1892, when he and his immediate grantees sold and conveyed the said square as an entirety to the defendants for sixty-seven thousand dollars, of which thirty thousand was paid in cash and thirty-seven thousand dollars, deferred purchase money, was secured upon the ground by a deed of trust, upon which the defendants have ever since paid the interest; that by the terms of the sale said Childs & Sons were to be allowed until February, 1893, to remove from said square; that they continued in occupation and possession of the whole of said square under said defendants, paying rent therefor down to the month of October, 1893, with the consent of said defendants, and that they held said square for some time after October without the consent of the defendants, but not disputing their title, being tenants holding over; that they removed the greater part of their effects from said square in the late fall or early winter of 1893–'4, but did not remove entirely until about the month of May, 1895; that the first structure placed by them on the square when they took possession in 1875 were two or more brick kilns erected on lot 10, and that these kilns were the last from which the bricks were removed when they left; that these bricks were in process of removal along during the winter of 1893–'4, and that a part of the machinery used by them in the making of brick, namely, two large rollers, with which the clay was crushed before being made into brick, were not removed until May, 1895; that these rollers and some machinery were hauled away in two four-horse wagons as late as about May 20, 1895; that the machine house was located on the north part of lot 1, in said square, at or about a point indicated by the witness Charles Childs on a plat of the square exhibited to

the jury, and that the rollers and machinery were north of the machine house; and on cross-examination in regard thereto the said Charles Childs testified as follows:

"'I don't know but what the rollers might have been on lot 10. The machine house stood right in here (indicating), and the rollers might have been on lot 10.'

"The defendants further offered testimony tending to show that in November, 1893, the defendant caused four signs to be posted, each about four feet square, to the effect that the entire square was for sale or rent on application to them, one at each corner of the square, one of them being located on lot 10; that some of the old bricks were left on the ground, which the witness thought Childs & Sons abandoned, but they did not charge defendants for them, which were suitable for use in building, and were still there; that defendants made no use of them, but that witness thought they would have used them if they had gone into building operations; that either in the latter part of March or the first part of April, 1894, the defendants rented the entire square to one John A. Downing, who rented it for the purpose of converting it into a base ball park, but did not use it for that purpose; that he occupied the house which was on lot 7 for a dairy lunch and sublet a portion of said house for a barber shop; that the acts he did in reference to the occupation of the vacant ground in that square were as follows: That he prevented various parties from depositing tools, tool boxes and railroad iron on the square, though none was attempted to be deposited on lot 10; that on the said square there were a couple of holes where the brick kilns had existed, and that there are the foundations of some kilns built of brick still there, and that the said Downing remained as such tenant in occupation of the said square, as aforesaid until June, 1895, when he sold his dairy lunch to a Mrs. Schulz, who took possession the same day; that after Isaac Childs & Sons left the square, which was in the winter of 1893–'4, perhaps along in November, December, January and February, they sold certain brick kilns, some of which were on lot 10, to James D. Childs, who in turn sold them to others, by whom they were taken away; that said James D. Childs did

not claim the land said bricks were on; that Mrs. Schulz continued in occupation of the property from June, 1895, down to the time of the trial; that she rented the house with the privilege of using the entire square, provided she neither placed nor permitted others to place anything unlawful upon it, and that she had stopped parties from dumping earth upon the square and from driving across it, though she made no use of it herself.

"The defendants thereupon produced as a witness in their behalf Goff A. Hall, assistant assessor of the District of Columbia, who gave testimony tending to prove that he had examined the tax books from 1875 down to the time of the trial, and that throughout that period the taxes on said lot 10 had been assessed and paid in the name of the defendants and those under whom they claimed.

"Thereupon the plaintiffs in rebuttal gave testimony tending to prove that the brick yard was established some time in the fall of the year 1875 and disappeared some time in 1893, leaving nothing remaining but the remnants of the old brick yard, and that the bricks were all removed from the kilns about March or April, 1894."

We think the evidence was sufficient to justify the action of the court in submitting the question to the jury, and the exceptions based on such action were not well taken.

2. Did the adverse possession apply to the title derived by the plaintiff Lucy T. Davis from her mother, Tracenia Latimer, and to the title of the plaintiff Millard P. McCormick, derived from his mother, Elizabeth McCormick?

It is one of the contentions of the plaintiffs that it did not apply to those titles, and error is based on a refusal of the court to so instruct the jury. The adverse possession began February 22, 1875; suit was brought May 17, 1895. There were therefore twenty years and a few months adverse possession. Richard Young, the common source of title, died in 1860, testate. His will in effect devised the property in controversy to Matilda, his wife, for life; remainder to Tracenia and Elizabeth and other children. Both were then married. Their mother, the life tenant, died October 7, 1874. Tracenia

died November 17, 1879, and her husband April 20, 1880. She left two children, one of whom is the plaintiff. Elizabeth died March 22, 1889. Her husband survived her, but died July 2, 1891. October 14, 1887, she and her husband conveyed their interests to their son, the plaintiff, Millard P. McCormick. From the death of Elizabeth and her husband, five and four years respectively elapsed before suit, and from the date of the conveyance to Millard over eight years. Assuming that Tracenia Latimer and Elizabeth McCormick were under disability when the adverse possession commenced, did that possession ever run against their interests, and if so, when did it commence to run?

The statute of limitations in force in the District is that of James I, c. 16. Under that statute no suit for lands can be maintained, except "within twenty years next after the cause of action first descended or fallen, and at no time after the said twenty years." Additional time is given to those under disability, as follows: "That if any person . . . who shall have such right or title of entry, be, or shall be at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; (2) so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or death, take benefit of, and sue forth the same, and at no time after the said ten years." (Sec. 2, p. 359, Compiled Stat. Dist. Columbia.)

More than twenty years elapsed after Tracenia's right accrued, as we have seen, before suit was commenced, and more than ten years of that time accrued after her death and that of her husband. She died under disability, but that made no difference. By the terms of the statute the time of limitation of suit commenced to run upon her death against her heir, Lucy T. Davis, and expired in ten years. No dis-

ability of Lucy T. Davis, if she was under any, arrested the running of the statute. Cumulative disabilities cannot be used to that effect. *Thorp* v. *Raymond*, 16 How. 247; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129; *Smith* v. *Burtis*, 9 Johns. 174; *Jackson* v. *Johnson*, 5 Cowen, 74; *Walden* v. *Heirs of Gratz*, 1 Wheat. 292; *Hogan* v. *Kurtz*, 94 U. S. 773; *Mercer's Lessee* v. *Selden*, 1 How. 37; *McDonald* v. *Hovey*, 110 U. S. 619.

The bar of the statute was therefore complete against her. But it was not complete against Millard McCormick. Ten years of the period of adverse possession had not run after the death of his parents or after the conveyance to him and before suit was commenced; and we are brought to the contention that a verdict should have been rendered for him. Passing on and disposing of the contention adversely, Mr. Justice Shepard, speaking for the Court of Appeals, 12 D. C. App. 51, 60, said:

"The rule is old and well established, that if one plaintiff in a joint action of ejectment cannot recover, his coplaintiffs cannot. *Morris* v. *Wheat*, 8 App. D. C. 379, 385. Hard as this rule may seem to be, it was followed in that case in obedience to the decision of the Supreme Court of the United States in *Marsteller* v. *McLean*, 7 Cranch, 156, 159. In that case Mr. Justice Story said: 'It seems to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported.' And again: 'When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.' See, also, *Shipp* v. *Miller*, 2 Wheat. 316, 324; *Dickey* v. *Armstrong*, 1 A. K. Marshall, 39, 40.

"There has been no legislation affecting the rule of practice in the District of Columbia, and we do not consider it within our province to make a change therein.

"The apparent hardship to this plaintiff might have been avoided by a separate suit on his own behalf.

"The original rule at common law was, that tenants in common could only sue separately because they were separately seized, and there was no privity of estate between them.

Mobley v. *Brunner*, 59 Penn. St. 481; *Corbin* v. *Cannon*, 31 Mississippi, 570, 572; *May* v. *Slade*, 24 Texas, 205, 507; 4 Kent Com. 368.

"The practice soon became general, however, in the United States to permit them to sue either jointly or severally as they might elect. 7 Enc. Pl. & Pr. 316, and cases cited. This seems to have been the practice in the District of Columbia, and, so far as we are advised, has never been questioned. Tenants in common may join in an action if they prefer to do so, but it is with the risk of the failure of all if one of them fail to make out a title or right to possession."

These remarks express the rule correctly.

It was urged at the argument by defendants in error, though not claimed in their brief, that neither Tracenia Latimer nor Elizabeth McCormick were under disability at any time during the period of adverse possession. The argument was that by the married woman's act of April 10, 1869, c. 23, 16 Stat. 45, they were given the same remedies in regard to their property that they would have had if unmarried.

The contention presents an interesting question, and maybe involves the further one whether their husbands ever became tenants by the curtesy. But we need not pass on them. Assuming the disability of Tracenia and Elizabeth and such tenancy, the errors assigned on the instructions given or refused were not well taken.

3. There was introduced in evidence as part of the chain of title of the plaintiff, Lucy T. Davis, a deed from her to John H. Walter and a reconveyance from him to her. From the latter was excepted "so much of all the lands and tenements above mentioned as had been conveyed by the party of the first part (Walter) to other persons prior to the filing of a bill in equity, cause 11,637 of the Supreme Court of the District of Columbia."

Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10 — the lot in controversy. Thereupon defendant's counsel cross-examined him at great length against the objection of plain-

tiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiffs' counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In *Rea* v. *Missouri*, 17 Wall. 532, it was said: "Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error."

It is also objected that Walter was subjected to discriminating remarks by the court. Plaintiff requested the following instruction:

"The jury are instructed that there is no testimony in this case tending to rebut the testimony of the witness John H. Walter that he never conveyed lot 10 in controversy in this case to any person other than the conveyance by the deed to plaintiffs Charles M. N. Latimer, Lucy T. Davis *and others, and the jury would not be justified in finding to the contrary.*"

The court struck out the words in italics and inserted instead, "and the weight to be given his testimony is a proper question for the jury."

The instruction as requested assumed the credibility of the witness; as modified, that question was submitted to the jury, who were the judges of it, and we cannot suppose that the jury misunderstood the court or believed a discrimination was intended.

To the other assignments of error special consideration is not necessary to be given.

Judgment affirmed.